FILE COPY

OCT 5 1929

CHARLES ELMORE CROPL
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 22.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,

Petitioner.

v.

GUARDIAN TRUST COMPANY,
Henry C. Flower, Receiver,

Respondent.

BRIEF FOR PETITIONER.

FRANK H. MOORE,
CYRUS CRANE,
A. F. SMITH,
Attorneys for Petitioner.

SAMUEL W. MOORE,
Of Counsel.

October 3, 1929.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

INDEX.

	PAGE
The opinions delivered in the courts below	1
Jurisdiction	2
Statement	2
The principal question in the case	3
The bill of the Cambria Company	4
The Trust Company's answer to the bill of the Cambria Company	6
The ancillary bill	7
The Trust Company's answer to the ancillary bill	8
The intervening petition and the Trust Company's answer	9
The charge of fraud	11
The accounting before the master	14
The decree of June, 1910, and subsequent proceedings	16
The decree of May, 1926, and subsequent proceedings	16
"The character of the litigation"	18
Specification of errors	22
Argument:	
I. The proper execution of the mandate of this Court required the taxation of costs only as between party and party, and did not require or authorize the taxation of costs as between solicitor and client	24
II. We earnestly contend that the lower court committed a grave error (1) in holding "that the federal courts of equity have jurisdiction to allow in proper cases costs	

PAGE

'as between solicitor and client,' " as such jurisdiction is exercised by the English Court of Chancery, and (2) in applying that erroneous principle to the facts in this case 29

Early statutes and rules of court..... 30

Early decisions of this Court..... 32

The Act of 1853, and its construction by this Court 33

Decisions of Circuit Courts of Appeals.. 40

Counsel fees incurred after the decree of June, 1910..... 42

III. The fact that complainants sought unsuccessfully to charge the Trust Company with the duties and obligations of a trustee, does not entitle it to the taxation of costs as between solicitor and client..... 45

IV. The litigation conducted by the Trust Company, for its own benefit with respect to the collateral security, does not entitle it to the taxation of costs as between solicitor and client..... 48

V. It is contrary to both reason and authority to base an allowance of counsel fees in this case upon the assumption that the Trust Company uncovered and brought into the constructive possession of the court a fund from which creditors of the Belt Company were entitled to be paid..... 51

The lower court's ruling is in direct conflict with the applicable authorities 53

VI. The statement in the opinion of the court of appeals that the entire litigation was vexatious, is entirely unwarranted for the reasons, first, it finds absolutely no sup-

PAGE

port in the record; secondly, it finds no support in the opinion and mandate of this Court (240 U. S. 166); thirdly, the record, as it stands, shows affirmatively the complete good faith of petitioner and the others associated with it during the entire litigation; and, fourthly, petitioner was wrongfully denied the right to introduce evidence in its own behalf upon that issue 59

There was ample justification for the filing of the Cambria bill and the ancillary bills 62

Petitioner was fully justified in filing its intervening petition 65

The evidence fully warranted the demand made for an accounting..... 66

The Trust Company's domination and control of the Belt Company and its subsidiaries 67

The DeGoeijen item..... 70

The Stilwell contract..... 73

The litigation which occurred after the final decree of June, 1910..... 77

The two injunction suits..... 80

No court has found that any part of this litigation was baseless and unwarranted 82

The opinion of this Court is controlling, and it contains no intimation that the litigation was vexatious..... 85

Cases and Authorities Cited.

	PAGE
Act of 1853, 28 U. S. C. A. Secs. 571, 573	33
Apollon, The, 9 Wheat. 362	32, 34
Arcambel *v.* Wiseman, 3 Dall. 306	32, 36, 38
Attorney General *v.* North Am. Life Ins. Co., 91 N. Y. 57	59
Baltimore, The, 8 Wall. 377	26, 34, 38
Boothe *v.* Coal Co., 72 Wash. 679	59
Bouvier's Law Dictionary, Vol. 3, p. 3399	62
Bray *v.* West, 9 Simons, 429	47
Buell *v.* Kanawha Lumber Corp., 201 Fed. 762, 768	53
Bulkeley *v.* The Earl of Eglington, 1 Jur. 994	47
Burke Const. Co. *v.* Kline, 271 Fed. 605, 260 U. S. 226	81
Canter *v.* Ins. Co., 3 Pet. 307	32, 34
Constitution of Missouri, Art. II, Sec. 10	44
26 Corpus Juris, 1061	11
20 Cyc. 825	57
Crescent City *v.* Butchers' Union, 120 U. S. 141	78, 81
Daniell's Chancery Practice, Vol. 1, p. 1011	47
Daniell's Chancery Pleading & Practice, Vol. 2, p. 1376	30
Day *v.* Woodworth, 13 How. 363	32
Doddridge County Oil & Gas Co. *v.* Smith, 173 Fed. 386	28
Equity Rules 33, 90	31
Ex Parte Union Steamboat Co., 178 U. S. 317	24
Fairmont Creamery Co. *v.* Minnesota, 275 U. S. 70, 73	29
First National Bank *v.* Chicago Trust Co., 207 U. S. 61, 66	60
Fraser *v.* Cole, 214 Fed. 556	41
Geddes *v.* Anaconda Copper Co., 254 U. S. 590	11, 63
Giles *v.* Randall, 1 K. B. D. 290, 296	30
Godefroi's Law of Trusts, p. 28	47

PAGE

Groves *v.* Sentell, 153 U. S. 465, 486 59
Guardian Trust Co. *v.* K. C. Southern Ry. Co., 146 Fed. 337; 171 Fed. 43 80
201 Fed. 811, 211 Fed. 696 ..... 2, 16, 25, 63, 78, 82
28 F. (2d) 233 ..... 1, 3, 17, 29, 80, 82

Hauerstein *v.* Lynham, 100 U. S. 483, 490 59
Heap *v.* Jones, 5 W. R. 106 47
Huff *v.* Bidwell, 195 Fed. 430 56

Johnson *v.* United Rys. Co., 247 Mo. 326, 152 S. W. 362 54
Judicial Code, Sec. 240, 28 U. S. C. A., Sec. 347 2

Kansas City Southern Ry. Co. *v.* Guardian Trust Co., 240 U. S. 166 ..... 1, 2, 3, 25, 59, 80
279 U. S. 827 ..... 2, 18
Kell *v.* Trenchard, 146 Fed. 245 28

Leary *v.* United States, 257 Fed. 246 41
Lewin, Law of Trusts, p. 1267 46

McIntosh *v.* Ward, 159 Fed. 66 40
Marks *v.* Leo Feist, 8 F. (2d) 460 42
Miller *v.* Kehoe, 107 Cal. 340 58
Missouri, K. & T. R. Co. *v.* Elliott, 184 U. S. 530 38
Missouri Pac. R. Co. *v.* Larabee, 234 U. S. 459 ..... 26, 38, 44
Missouri, Rev. St. 1919, Sec. 1398 52
Mohun *v.* Mohun, 1 Swanston 201 47
Motion Picture Patents Co. *v.* Steiner, 201 Fed. 63 41

Northern Pac. R. Co. *v.* Boyd, 228 U. S. 482 43
Norway *v.* Norway, 2 M. & K. 278 47

Oelrichs *v.* Williams, 15 Wall. 211 ..... 26, 27, 35, 37, 38

Perry on Trusts, 6th Ed., Sec. 896 46
Pickel *v.* Pickel, 147 S. W. 1059 57
Pike *v.* Cincinnati R. Co., 179 Fed. 97, 103 59

Re Sanford Fork & Tool Co., 160 U. S. 247 24
Re Washington R. Co., 140 U. S. 91 24

PAGE

Report of Mr. Justice Nelson, 1 Blatch. C. C. 652..... 31
Revised Statutes, Secs. 823, 824..... 27
Riddle *v.* Hudgins, 58 Fed. 490, 494..... 59
Rules and Orders of the Supreme Court, 2 L. Ed..... 31

St. Louis, K. & C. R. Co. *v.* Wabash R. Co., 217 U. S. 247, 251 24
Savage *v.* Sherman, 87 N. Y. 285..... 59
Sioux County *v.* National Surety Co., 276 U. S. 238, 16 F. (2d) 288..... 26
Smith *v.* Equitable Trust Co., 215 Pa. 413..... 51
Straus *v.* Victor Talking Mach. Co., 297 Fed. 791, 798 44

Tiffany and Bullard on Trusts and Trustees, p. 714..... 46
Trustees *v.* Greenough, 105 U. S. 527.....39, 53, 54
Tullock *v.* Mulvane, 184 U. S. 497.....26, 27, 37

U. S. C. A. 28, 571, 572..... 33
United States *v.* Smith, 240 Fed. 756..... 28
United States *v.* Terminal R. R. Assoc., 236 U. S. 194 24
United States *v.* Wilson, 193 Fed. 1007..... 28

Wagener *v.* Mars, 27 S. C. 97, 2 S. E. 844, 846..... 58
Wetmore *v.* Mellinger, 64 Iowa 741..... 44
Willard *v.* White, 56 Hun 581..... 51
Wolf *v.* Am. Tr. & Sav. Bank, 214 Fed. 761..... 51
Work *v.* Tibbits, 87 Hun 352..... 51

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 22.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

GUARDIAN TRUST COMPANY, Henry C. Flower, Receiver,
Respondent.

BRIEF FOR PETITIONER.

The opinions delivered in the courts below.

The official report of the opinion of the circuit court of appeals for the eighth circuit, sought to be reviewed herein, will be found in 28 F. (2d) 233. There were two opinions rendered in the district court, not yet officially reported. The first opinion, delivered in June, 1923, will be found in the record (Rec. I, 691); and the second opinion, rendered in March, 1926, will be found in the record (Rec. I, 704).

NOTE.—The transcript of the record brought to this Court consists of two volumes. Volume II, which is first, in point of time, is a copy of the record in the original case in this Court, in *Guardian Trust Co.* v. *The Kansas City Southern Ry. Co.*, reported in 240 U. S. 166. References to its pages are as follows: "Rec. II, ...)." Volume I is a transcript of subsequent proceedings in the district court and circuit court of appeals for the eighth circuit. References to its pages are as follows: "(Rec. I, ...)."

The Trust Company appealed to the circuit court of appeals for the eighth circuit from the decree (Rec. I, 128) following the second opinion.

Jurisdiction.

An application for a writ of certiorari to the circuit court of appeals for the eighth circuit was made by petitioner under section 240 of the Judicial Code, as amended (28 U. S. C. A. sec. 347). The decision of that court was handed down on May 18, 1928 (Rec. I, 722-749). A motion for a rehearing was filed by petitioner on July 16, 1928 (Rec. I, 751-821), and was overruled on October 18, 1928 (Rec. I, 821). The application was made within three months after the overruling of said motion for a rehearing and after the entry of the decree sought to be reviewed by this Court. The application was granted by this Court February 25, 1929 (279 U. S. 827).

Statement.

Volume II is the precise record before this Court when it decided this case on its merits in February, 1916 (240 U. S. 166), and it is also the record that was before the circuit court of appeals when it handed down its two opinions (201 Fed. 811; 210 Fed. 696) which that decision affirmed. It will be noted that Volume II contains the pleadings, master's report, decree, and certain other formal matters, but does not contain the evidence on the merits of the case. This evidence has not at any time been brought to this Court or to the court of appeals.

Volume I contains the proceedings in the district court touching the taxation of costs following the decision of this

Court in 1916. The record before the court of appeals when it rendered its third opinion (28 F. (2d) 233), now under review, consisted of Volumes I and II.

The principal question in the case.

The principal question in the case, quoting from our application for certiorari, is as follows:

Was the district court for the western district of Missouri, upon receipt of the mandate of this Court in *The Kansas City Southern Railway Company* v. *Guardian Trust Company,* 240 U. S. 166, required or authorized to tax against petitioner, in its final decree, costs "as between solicitor and client", including therein the disbursements of the Trust Company for attorneys' fees and other expenses incurred during the entire period of the litigation?

The district court held (Rec. I, 704-720) that only costs as between party and party should be taxed, and rendered its final decree accordingly (Rec. I, 128-131). Such costs have been duly taxed and paid, and are not involved herein. Our contention is that the district court was clearly right in its ruling.

The circuit court of appeals for the eighth circuit, upon appeal by the Trust Company, held that our federal courts possess the powers of the English Chancery Court over the taxation of costs, and, purporting to exercise those powers, it reversed the decree of the district court (Rec. I, 722-749) and remanded the case with instructions to tax costs "as between solicitor and client". Its decree requires the taxation, as costs against petitioner, of attorneys' fees, and other disbursements of the Trust Company, in the sum of approximately $300,000 (Rec. I, 59). Petitioner seeks a review by this Court of the decree of the circuit court of

appeals. It is believed that this highly important question of federal practice can be determined by the Court as a matter of law, without opening the record in this twenty-nine year old case.

The bill of the Cambria Company.

This litigation had its inception in September, 1900, when the Cambria Steel Company, a judgment creditor of the Belt Company, filed a creditor's bill in behalf of itself and other creditors (Rec. II, 3) in the federal court at Kansas City, Mo., against the Trust Company, the Belt Company, and others.

The complaint alleged, in substance (Rec. II, 5-6) that the Trust Company, prior to the year 1887, conceived and entered upon the plan and purpose to cause to be constructed a number of railroads, including that of the Belt Company, by various corporations, all to be organized by the Trust Company, and to be officered with officers and directors of the Trust Company, and thereby completely to dominate and control the actions of such railroad and other companies, and their several officers and directors; that it was the plan and purpose of the Trust Company to gather unto itself all the profits and other advantages accruing in the premises, and to foist upon such railroads, including the Belt Company, any losses that might be sustained or liabilities that might result in the premises.

It was further alleged that in carrying out its said plan and purpose, the Trust Company assumed the position and duty of trustee and agent in managing and disposing of the bonds, stocks, funds and other assets of such railroad and other companies, in trust for the use and benefit of the parties who might become concerned or interested therein;

and that, consequently, the relation of the Trust Company to each and all of such railroad and auxiliary companies was that of principal, bound and charged with the duty to indemnify and protect the railroad and other companies, so employed and utilized in any particular transaction, against any and all losses, burdens and liabilities arising in the premises.

Then followed allegations (Rec. II, 6-12) as to the various companies organized and officered by the officers and directors of the Trust Company, and the various transactions whereby it was alleged losses had been sustained and, through the domination and control of the Trust Company, unlawfully charged to the Belt Company, and unlawful profits and charges made at the expense of the Belt Company, resulting, on March 31, 1899, in an apparent, but not a real, indebtedness of the Belt Company to the Trust Company in the sum of approximately $360,000; that on said date promissory notes were caused to be given by the Belt Company to the Trust Company to evidence its alleged indebtedness, and the Belt Company was caused to pledge with the Trust Company all its available securities (listed (Rec. II, 14) and disposed of in final decree (Rec. II, 906)) as collateral to secure the same; that the giving of the notes and collateral was done fraudulently, through such domination and control, in anticipation of the insolvency and receivership of the Gulf Company, which occurred the following day, April 1, 1899 (Rec. II, 12-15); and the prayer (Rec. II, 18) was for an accounting, for a cancellation of the alleged indebtedness from the Belt Company to the Trust Company, the subjection of the collateral to the payment of complainant's debt, and for an injunction to restrain a threatened sale by the Trust Company of said collateral.

The Trust Company's answer to the bill of the Cambria Company.

The answer of the Trust Company (Rec. II, 33) denied the allegations of the bill, and particularly denied the existence of any trust relations in the following language (Rec. II, 42):

> Denies that in carrying out any of its plans and purposes as alleged in the bill of complaint the defendant assumed the position and duty of trustee and agent in managing and disposing of the bonds, stocks, funds and other assets of said railroad companies and auxiliary companies in trust, and for the use and benefit of the parties who might become interested therein, as alleged in the bill of complaint; and denies that as a consequence of any such alleged position the relation of this defendant to any of such railroad companies and auxiliary companies in any wise became or was as principal bound and charged with the duty to indemnify or protect any such railroad or auxiliary company in any transaction against any loss, burden or liability, as alleged in the bill of complaint. Denies that it became the duty of the defendant, as to persons becoming interested in any of said railroad companies or auxiliary companies as creditors, to dispose of the stock, bonds, funds or other assets of any such railroad companies or auxiliary companies for the use and benefit of the persons interested therein, or who might become interested therein as creditors or otherwise, as alleged in the bill of complaint.

The Trust Company expressed a willingness to render a full and true account to the Belt Company, and to furnish all such information whenever thereunto lawfully and properly requested. It said (Rec. II, 48):

> . . . Notwithstanding the fact that the said Belt Company has at all times had full and true accounts and knowledge of all the transactions between it and this defendant as aforesaid; yet, if, for any reason, it desires further accounting or information as to any of the said matters or things, this defendant is ready and willing and hereby offers again to render a full and true account and to furnish all such information, whenever thereunto lawfully and properly requested.

Under the bill of the Cambria Company, the issue was one of debt or no debt between the Belt Company and the Trust Company. With this determined the collateral would go to the party entitled to it.

The ancillary bill.

The ancillary bill of the Belt Company and its receivers, under which the accounting, in the main, was carried on, was filed in November, 1901 (Rec. II, 97), pursuant to stipulation (Rec. II, 890) which consented that the accounting sought should be expedited, and also required that the Belt Company should be co-complainant with the receivers. This ancillary bill, as appears from the stipulation, superseded a so-called cross-bill, previously filed by the receivers as sole cross-complainants. The receivers became parties complainant pursuant to the authorization contained in the order appointing them (Rec. II, 29). They were expressly authorized and empowered "to bring suits for *an accounting* . . . against any and all persons whatsoever, based upon or arising out of *past dealings or relations.*" This could only apply to an action for an accounting against the Trust Company. There was no one else with whom the Trust Company had

had "past dealings or relations" of any consequence. The ancillary bill was substantially the same as the bill of the Cambria Company. It sought an accounting and a cancellation of the alleged indebtedness. An amended and supplemental ancillary bill was filed in March, 1905 (Rec. II, 202), at the request of the Trust Company and in response to its motion for a surcharging and falsifying of the accounts brought in by the Trust Company (Rec. I, 15). A further amended ancillary bill and also the Trust Company's answer thereto were filed together on July 2, 1906 (Rec. I, 392), by stipulation (Rec. II, 391), at the close of the taking of testimony, to conform the pleadings of both parties to the proof. The allegations of this amended ancillary bill are summarized by the master (Rec. II, 584 *et seq.*).

The Trust Company's answer to the ancillary bill.

The Trust Company answered the ancillary bill, in December, 1901 (Rec. II, 115), admitting the community of officers (Rec. II, 148), but denying that it had dominated and controlled the railroad companies, including the Belt Company. It also sought to justify its action in the various matters complained of, and offered to make such further accounting as might be desired. It said (Rec. II, 148). "The Trust Company has at all times stood ready, and is still ready and willing, to make such further accounting thereof as may by the court be required."

And, again, it said (Rec. II, 155):

> These defendants further state and show that they are ready and willing, if in the judgment of this court, they ought and should do so, to render a fuller accounting of any and all of the transactions of the Trust Company with any and all of said companies,

in such manner and at such times as the Court may direct.

(In this connection, it seems proper to state that the master subsequently ruled that an accounting should be had (Rec. I, 14).)

A similar answer, but pleading laches and the state statutes of limitation (Rec. II, 370), was filed (Rec. II, 312) to the first amended ancillary bill of complaint, and also (Rec. II, 461) to the second ancillary bill of complaint.

Under the ancillary bill of the Belt Company and its receivers, the issue was one of debt or no debt between the Belt Company and the Trust Company. The fate of the collateral would depend upon the determination of this issue.

The intervening petition and the Trust Company answer.

Petitioner became a party to the litigation in 1905 by intervening petition (Rec. II, 166), filed by stipulation (Rec. II, 164). It charged that the Gulf Company, the Belt Company and the Air Line had executed mortgages covering after-acquired property, the lien of which attached to certain of the collateral held by the Trust Company, or to the properties represented thereby; that petitioner, as purchaser at foreclosure sales of the properties of those companies, had become the owner thereof, and demand was made for the securities or the properties which they represented.

The answer of the Trust Company (Rec. II, 186) contained a denial of the allegations of the intervening petition, pleaded laches and the state statutes of limitation (Rec. II, 198), and further alleged (Rec. II, 199-201) that by reason of the reorganization of the Belt Company, peti-

tioner had become liable for its debt to the Trust Company.

Thus it appears that this liability issue, which thereafter became the dominant issue in the action, was one which the Trust Company itself injected into the case in 1905. It is largely the attorneys' fees and other expenses of the Trust Company incurred in litigating this issue which it now seeks to impose upon petitioner.

By stipulation (Rec. II, 267), petitioner was permitted to file an amended intervening petition, and to include therein its claim against the Trust Company for alleged breach of trust as trustee in the mortgage made by the Union Terminal Railway Company; and the Trust Company consented that the issues so made should be referred to the special master, and waived any objection it might make to said intervening petition on the ground of multifariousness or other formal matters.

The amended intervening petition (Rec. II, 269) was substantially the same as the original pleading, except that (Rec. II, 288) it alleged that it was the duty of the Trust Company, under the mortgage of the Terminal Company, to see that as the bonds of the Union Terminal Railroad Company were sold, the proceeds thereof were used in the construction, completion and equipment of the railroad of the Union Terminal Railroad Company, and alleged a failure to perform this duty.

The answer of the Trust Company (Rec. II, 293) in the main followed its answer to the original intervening petition, but denied the alleged trusteeship in the matter complained of, asserting that no duty was imposed upon it, either by law or by the express terms of the mortgage, to see that the bonds as sold were used in the construction of the railroad, saying (Rec. II, 307):

Respondent denies that either by law or by the express terms of said mortgage it was the duty of respondent to see that as said bonds were sold, proceeds thereof should be used in the construction, completion and equipment of said railroad. On the contrary respondent says that there was no such duty imposed either by the terms of said mortgage or by law.

Under the intervening petition of petitioner, the issue was three-fold: first, was petitioner the owner of the collateral security, or the properties represented thereby? Secondly, did the Trust Company assume a relation of trust with respect to the use of the proceeds of the Union Terminal bonds; and if so, was that trust violated? Thirdly, did petitioner assume the debt of the Belt Company?

The charge of fraud.

Much is said in the opinion of the lower court about the charge of fraud. It is true that fraud was charged on both sides; but the fraud charged against the Trust Company was in the nature of constructive fraud (26 C. J. 1061), arising from the relation of the parties, the common officers and directors controlling the corporations in question, and the alleged misuse by the Trust Company of the power derived from this community of interest, within the rule of the *Geddes* case, 254 U. S. 590. This will be referred to later.

The master did not feel that charges of actual fraud were involved in complainant's bills, except in the one instance of the transfer of collateral security by the Belt Company to the Trust Company on March 31, 1899, on the eve of the insolvency of the Gulf Company and the prospective loss of control by the Trust Company over the affairs

of the Belt Company. The ancillary bill is summarized by the master (Rec. II, 584-592). The word "fraud" does not occur. The word "fraudulent" occurs but once (Rec. II, 592), and is there used to characterize the said transfer of the collateral security. In this connection, the master finds (Rec. II, 754) that when this transfer was made, the officers of the Trust Company knew that the Gulf Company would default in its interest and that receivers would be appointed for it, and that that would likely mean that the Trust Company would not thereafter have a controlling influence in Belt Company matters. These facts, we feel, fairly justified the charge that the transfer was fraudulent.

The allegations of the intervening petition of petitioner are summarized by the master (Rec. II, 735-742). Neither the word "fraud" nor "fraudulent" appears.

The master's conception of complainants' bill was not that it abounded in wholesale charges of fraud, as suggested by the court of appeals, but that it was based upon the alleged domination and control by the Trust Company of the Belt Company. In this respect he says (Rec. II, 583):

> Before, taking up, for consideration, the various "items", or complaints, contained in the second ancillary bill, the master has thought best to make a somewhat extended reference to the controlling question in this cause, that is, the alleged domination and control by the Trust Company of, and over, the Belt Company, and its constituent companies, which complainants contend to have existed throughout the whole period, covered by the transactions, complained of in said bill.
>
> It will be manifest to the Court, from a careful reading of this second ancillary bill, that it is grounded upon the proposition that the Trust Company so dominated and controlled these other com-

> panies, that their directors and officers were merely agents of the Trust Company to execute the wishes of A. E. Stilwell and others dominant in the control of Trust Company affairs.

And, again (Rec. II, 641):

> The underlying theory, upon which complainants' bill is grounded, is that the Trust Company dominated and controlled the Suburban Company, afterwards the Belt Company, and its constituent companies, and also, the subsidiary companies named in the bill, by virtue of causing the employees, officers and directors of the Trust Company to be elected officers and directors of the Suburban Company, and other corporations, and thereby placing the agents, employees and officers of the Trust Company in charge of such companies, respectively, so that these companies might be dominated and controlled at the behest and in the interest of the Trust Company, and, which complainants allege was done, continuously, through the period of years intervening between the incorporation of these companies and April, 1900, when what was known as the Stilwell management of the Belt and allied companies, lost control, and the Southern Company, and those associated with it, acquired control thereof through the receivership and foreclosure proceedings, mentioned in the bill.

The Trust Company itself did not feel that charges of gross fraud or misconduct had been made against it. It deliberately took the position that the charges made were of constructive fraud, and not "actual fraud." This is a matter of record. The intervening stockholders of the Trust Company characterized the bill as "a mere cry of domination and constructive fraud" (Rec. II, 963). In the "Answer of Guardian Trust Company on rule to show

cause," filed in the lower court on December 16, 1907, it is said, in paragraph 13 (Rec. II, 558):

> There is no valid cause of action against this defendant set up in the said ancillary bill of complaint; *no actual fraud is charged therein* and said bill presents a legally meaningless theory and an impossible case.

The foregoing statement is signed by Mr. Rosenberger and Mr. Mecartney, both counsel for the Trust Company at that time, and is sworn to by the former.

It thus appears that it was the deliberate opinion of the Trust Company in 1907, about a year after this case had been argued for two weeks before the special master, when the whole matter was fresh in the minds of counsel, that no "actual fraud" had been charged against it.

The accounting before the master.

As before stated, the Trust Company in its answer (Rec. II, 48, 148, 155) consented to an accounting, and by its stipulation (Rec. II, 891) agreed that the accounting should be had and expedited. The district court, in March, 1908, in an unreported opinion in this case, held that this stipulation evidenced the full consent of the Trust Company to an accounting. It said: "It (the Trust Company) has consented that the master take an accounting, finding and report as to the respective rights and claims of the parties to the property, notes, bonds and claims involved." Judge Trimble, counsel for the Trust Company when its answer was filed consenting to an accounting, consulted with his partners before that course was determined upon (Rec. I, 278).

New counsel for the Trust Company having come into the case, they raised before the master, in February, 1905, the right of complainants to an accounting, and the master ruled "that, under the circumstances, there shall be an accounting in this case"; and the Trust Company then demanded that complainants in the ancillary bill "specify the items of this long and complicated account which are in dispute here." Whereupon counsel for complainants in the ancillary bill, at the request of the Trust Company and in response to its motion, announced his intention to file, and afterwards filed, an amended bill surcharging and falsifying. This appears from a fragment of the proceedings before the master, found in Rec. I, pages 14-15.

A large amount of testimony was taken before the master. It appears from an affidavit filed in the lower court that there were 6,950 pages of oral evidence and 27,592 pages of documentary evidence, principally copies of vouchers and records. The case was argued for two weeks before the master in July, 1906 (Rec. II, 1023). The master's report was filed in May, 1910 (Rec. II, 575). It recommended (a) that the Trust Company's claim against the Belt Company be reduced by three items, aggregating $21,850 and interest, and sustained as to all other items; (b) that the lands of Central Improvement Company, which cost $169,349.60 (Rec. II, 280) and which were referred to in argument as having a value of $300,000 to $400,000 (Rec. II, 952), be conveyed to petitioner; and (c) that petitioner be held not liable in any way for the floating indebtedness of the Belt Company (Rec. II, 887).

The decree of June, 1910, and subsequent proceedings.

The district court overruled all exceptions to the master's report and entered a final decree, in June, 1910 (Rec. II, 903), carrying out the recommendations of the master. The Trust Company appealed to the circuit court of appeals for the eighth circuit, which (1912-1913) reversed the decree of the lower court (201 Fed. 811; 211 Fed. 696). Petitioner thereupon appealed to this Court, which, in February, 1916, affirmed the decree of the circuit court of appeals (240 U. S. 166). Petitioner, in April, 1916, paid the Trust Company $821,623.28 (Rec. I, 129), as the full amount of its claim, with interest. This proved to be an overpayment, which was adjusted in the final decree of May, 1926 (Rec. I, 130).

The decree of May, 1926, and subsequent proceedings.

Six years later, in October, 1922, the Trust Company moved in the district court for a final decree in accordance with the mandate of this Court (Rec. I, 15). The lower court in its first opinion, in June, 1923 (Rec. I, 691), reached the conclusion that costs should be taxed as between solicitor and client, and appointed a master (Rec. I, 20) to ascertain and state all items of costs and expenses paid or incurred by the Trust Company, "including among other expenses those for attorneys' fees, counsel or solicitor fees, stenographers' fees, expert accountants' fees, printing fees, traveling expenses, and other expenses incurred in the premises".

The district court having intimated in its first opinion (Rec. I, 698) that the circuit court of appeals had found that the litigation was vexatious, but expressly stating that

it expressed no independent judgment of its own thereon, petitioner, in December, 1923 (Rec. I, 33), filed a motion and application for leave to file a duly verified petition "to introduce testimony proving that this litigation was instituted and conducted on the part of each of the complainants in entire good faith", and setting out in detail the oral and documentary evidence which it desired to introduce (Rec. I, 34-44). This motion was overruled, and permission to introduce testimony was refused (Rec. I, 45).

The master filed his report on September 15, 1924 (Rec. I, 46), finding that the costs as between party and party amounted to $11,499.32 (Rec. I, 49), and that the costs as between solicitor and client amounted to $296,520.37 (Rec. I, 59). Of this latter sum, $280,867.98 was for attorneys' fees which were incurred in the litigation from beginning to end, including services in the circuit court of appeals and in this Court. Exceptions to the master's report were filed by both parties (Rec. I, 94, 106).

At the argument of the exceptions, the court permitted a reargument of the entire matter, and in an opinion dated March, 1926 (Rec. I, 704), the court reversed its former ruling, and held that the law did not permit the taxation of costs as between solicitor and client in this case, but only as between party and party. A final decree in accordance therewith was accordingly entered in May, 1926 (Rec. I, 128).

From this decree the Trust Company appealed to the circuit court of appeals for the eighth circuit, and that court, in May, 1928, reversed the said decree of May, 1926 (28 F. (2d) 233), to review which action of the circuit court of appeals petitioner, after an unsuccessful motion for a rehearing, presented its application to this Court for a writ

of certiorari, which was granted February 25, 1929 (279 U. S. 827).

Some additional facts are stated under the following heading, and also in that part of the brief, beginning at page 59 dealing with the lower court's intimation that this entire litigation was vexatious.

"The character of the litigation."

Under this heading (28 F. (2d) 234), the court of appeals, in its decision now under review, seeks to differentiate this case from the usual and ordinary equity proceeding and to place it in a special category, and to apply to it special and unusual rules. We desire to point out several matters which, we feel, have been misunderstood or misconstrued by the court.

1. The court of appeals regarded this case as essentially one of fraud, where wholesale and indiscriminate charges of fraud have been made against the Trust Company and adjudged to be unfounded. With all due respect to the lower court, we feel that this is entirely erroneous, and have no hesitation in saying that the parties who conducted the litigation in the lower court, and the master, as well as the lower court itself, took a different view. Complainants' theory throughout the litigation was, as above stated, that the Trust Company, through a community of officers and directors, had dominated and controlled the Belt Company and imposed unjust charges upon it. The community of officers and directors was one of the established facts in the case (Rec. II, 148, 597). It was conceded that over a period of years the same officers representing both companies dealt with themselves in a dual capacity. This, and not actual fraud, was the gravamen of the action.

It is entirely plain that the master did not for a moment, during the nine and one-half years that the case was before him, imagine that he was trying a case where actual fraud was the dominant and controlling element, or even a substantial element. This is clear from his statements in his report (Rec. II, 641, and Rec. II, 583, quoted above).

2. It is said by the court of appeals (p. 239) that "the charge that the Trust Company had violated fiduciary relations with the Belt Company and its subsidiary companies was adjudged not true." We feel that this statement, while true enough in a general sense, is nevertheless quite misleading in this case. It assumes that the Trust Company, having assumed admitted or established fiduciary relations towards the Belt Company and its subsidiary companies, was charged in the bill with the violation of its duties and obligations thereunder. The charge in this case was that the Trust Company *had assumed* fiduciary relations of this character, which, if established, would create certain obligations. The Trust Company vigorously denied that it had assumed any such relations. The finding of the master and the district court supported the Trust Company's contention. Hence, there were no fiduciary relations to be violated. The parties, therefore, sustained the relation of ordinary litigants toward each other. It is apparent, therefore, that the case is quite fundamentally different, as hereafter pointed out, from one where, fiduciary relations having been established or admitted, the issue is whether or not they have been violated.

3. Again, the court of appeals says (p. 239): "the charge that the Trust Company had violated its duty as trustee under mortgages of the Belt Company and its subsidiary companies was adjudged not true." But what was

actually adjudged was that no trusteeship in the matter in question actually existed, or ever had existed. Hence, no such duty or obligation as rests on trustees ever came into existence. It is one thing to charge the existence of a trusteeship and fail to establish it, as was the case here, and quite another thing to charge a violation of a trusteeship which has been actually established or admitted. There were two instances where complainants sought an adjudication that the Trust Company had assumed the duties of trustee in the particular matter specified: First, with respect to the Union Terminal bonds, where it was charged that the Trust Company had assumed certain duties and obligations as trustee with respect to the use of Union Terminal bonds and their proceeds. The Trust Company denied the existence of any such trust relations, and this defense was sustained (Rec. II, 872 *et seq.*). No trust relation therefore ever existed.

In the other instance, it was charged that the Trust Company, being a trustee in the Belt Company mortgage, thereby assumed such a trust relation to the Belt properties and the Belt bondholders as to disable it from taking or receiving any of the Belt assets or properties as security for its own indebtedness (Rec. II, 757). The master held that no such trust relation existed, saying (Rec. II, 760): "the Trust Company was under no such duty to the Belt bondholders as would prohibit it from taking collateral security to secure an indebtedness to it from the Belt Company." It was the non-existence of the trust relation which was adjudicated.

4. It was said by the court of appeals (p. 238): "The master recommended, further, that the amended petition of intervention of the Southern Company be dismissed as

being without either law or equity, except as to one paragraph in regard to certain lands standing in the name of the Central Improvement Company, one of the subsidiary companies, and that the Trust Company was entitled to hold and subject to the payment of the debt to it from the Belt Company all of the collateral mentioned." One would naturally infer from this statement that the Trust Company had been completely successful in its contest over the collateral, except in one matter of minor importance, touching the Central Improvement Company lands. Such, however, was not the case. The Central Improvement Company lands, or the Central Improvement Company stock (which had no value outside of the lands) was the most important of the items in controversy, and these were awarded to petitioner. The master (Rec. II, 781) refers to the stock as "one of the most valuable collateral securities." The value of the lands, as pointed out above, ran into several hundred thousand dollars.

On the other hand, the stocks and bonds adjudicated to the Trust Company in the final decree (Rec. II, 906) were either of small value, or had disappeared from the case as items of collateral before the litigation began (Sept. 7, 1900), or was fairly under way. Thus, the 15,000 shares of Union Company stock and the 5,000 shares of Air Line stock were sold by the Trust Company in June, 1900, for $35,000, and that amount was credited upon its debt against the Belt Company (Rec. II, 769). The 1120 shares of capital stock of Central Improvement Company, for which a separate receiver had been appointed, had no value outside of the lands, which, as above stated, were awarded to petitioner. The 439 shares of stock of Northern Townsite Company, which also had its own receiver, were of small value, as appears from the decree (Rec. II, 914). The 425 shares

of stock of Missouri Elevator & Terminal Company, also in receivership, were worthless, the property of that company having been turned over to the mortgagee by order of the court. The 25 shares of Fairmount Amusement Company were of no value. The 13,920 shares of stock of Northern Connecting Railroad Company were sold by the Trust Company on September 30, 1899, for $19,885.71 and credited upon the Belt debt (Rec. II, 773). The 315 First Mortgage Bonds were sold by the Trust Company on October 23, 1900, for $110,250, and applied on the Belt debt (Rec. II, 772). The 99 First Mortgage Bonds of the Northern Connecting Railroad Company were sold November 1, 1901, under order of court, and the proceeds, $40,001.25, credited on the decree (Rec. II, 903, 907). The steel rails and fastenings were sold by the Trust Company for $11,133.06, on September 26, 1900, and the proceeds credited upon its claim against the Belt Company (Rec. II, 780). There is no record of the disposition of the claim of the Belt Company against the Gulf Company for switching charges and terminal services, amounting to about $133,000.00. This completes the list.

It thus appears that petitioner was awarded the only item of collateral security of substantial value held by the Trust Company during the years of the litigation.

Specification of Errors.

For its specification of such assigned errors as are intended to be urged, petitioner alleges that the circuit court of appeals committed error in the following respects:

1. In holding that the opinion of this Court required or authorized the taxation of costs "as between solicitor and client".

2. In holding that "the United States courts of equity at the time of their creation became endowed with the powers, including that over costs, possessed by the English chancery courts".

3. In holding that "the federal courts of equity have jurisdiction to allow, in proper cases, costs 'as between solicitor and client'."

4. In holding that the respondent is entitled to taxation of costs "as between solicitor and client" in this case.

5. In holding that the Trust Company, as a pledgee, is entitled to taxation of costs "as between solicitor and client", although it litigated its right to the pledged property, not in the interest of the pledgor, and not for the care, preservation or protection of the property, but in its own individual interest, and for its own personal protection.

6. In holding that the Trust Company, when sought to be charged as trustee, or with the obligations resting upon trustees, is entitled to taxation of costs "as between solicitor and client", notwithstanding the fact that the Trust Company disclaimed any trusteeship and any and all fiduciary obligations, and was successful in maintaining this defense.

7. In holding that after the Trust Company succeeded in holding petitioner liable for the debt of the Belt Company, and in collecting from petitioner its entire debt and interest, it is entitled to taxation of costs "as between solicitor and client", upon the theory that it occupied the position of a creditor, who, in behalf of itself and others, has brought a fund into court for distribution, and is awarded an allowance from the fund.

8. In holding that "the whole litigation" was of a "vexatious character", particularly after denying petitioner an opportunity to offer evidence in its own behalf on that issue.

ARGUMENT.

I.

The proper execution of the mandate of this Court required the taxation of costs only as between party and party, and did not require or authorize the taxation of costs as between solicitor and client.

It is familiar law that it was the duty of the district court to which the mandate in this case was addressed by this Court, to carry it into execution according to its terms, in the light of the opinion of this Court. It could not vary it, or examine it for any other purpose than execution; or give any other or further relief, or review it, even for apparent error; nor intermeddle with it in any manner (*Ex Parte Union Steamboat Co.*, 178 U. S. 317; *Re Washington R. Co.*, 140 U. S. 91; *Re Sanford Fork & Tool Co.*, 160 U. S. 247).

So well established is this rule that this Court will grant certiorari to the court of appeals where, as here, the question "involves the construction of a prior decree of the United States circuit court affirmed by this Court" (*St. Louis, K. C. & C. R. Co.* v. *Wabash R. Co.*, 217 U. S. 247, 251). This Court will inquire into the proper execution of its own decree "either by original proceeding or in any other appropriate form" (*United States* v. *Terminal R. Assoc.*, 236 U. S. 194, 199).

This Court (240 U. S. 166) affirmed the decree of the circuit court of appeals for the eighth circuit (210 Fed. 696), which directed (pp. 723, 724) the entry by the district court of a specific decree, complete in all details, disposing of the entire controversy, *including the matter of costs.* The mandate of this Court (Rec. I, 467) adjudged that said decree be "affirmed with costs," and that the Trust Company et al. recover against petitioner "twenty dollars for their costs herein expended and have execution therefor."

There are numerous references in the directions for the entry of a specific decree (210 Fed. 723, 724), to "the costs of this suit"; "the costs after as well as before the decree"; "its costs down to the entry of the decree"; with a further provision that the Trust Company shall be permitted to pursue either the Cambria Company or the Southern Company, or both of them, "until its costs are paid". After refusing to entertain, and, in effect, denying, the petition of the three stockholders for a taxation against petitioner of the amount of the Trust Company's attorneys' fees, etc., the court said: "Our conclusion is that our just course is to leave the *taxation of costs* to the court below, under the principles, rules and practice in equity."

When this Court affirmed the decree of the lower court, directing the entry of a specific decree, complete in all details, and awarding "costs", without further designation or qualification, against the unsuccesssful party, and leaving the "taxation costs" to the lower court, we submit that it could only mean taxable costs, in the ordinary acceptation of the term; that is, costs as between party and party, as the word "costs" has been used in judgments and decrees from time immemorial, in accordance with the practice of taxing costs which has prevailed in this country from the beginning; in other words, it meant *taxable costs,*

as distinguished from an "allowance" out of a fund, or as distinguished from attorneys' fees fixed by statute and allowed in certain designated cases.

It is not to be assumed that this Court acted inadvertently, and that what it really intended was to import into our jurisprudence the English system of taxation of costs, by which the losing party is to be burdened and penalized with the attorneys' fees and other expenses of the successful litigant. Nor is it to be assumed that this Court, merely by affirming a decree carrying "costs", intended thereby to overrule its long line of decisions, such as *The Baltimore,* 8 Wall, 377; *Oelrichs* v. *Williams,* 15 Wall. 211; *Tullock* v. *Mulvane,* 184 U. S. 497, and *Missouri Pacific R. Co.* v. *Larabee,* 234 U. S. 459, which, we contend, authoritatively established a rule in this country exactly to the contrary.

It seems too plain to require extended argument that if this Court had intended any departure from the ordinary practice in the taxation of costs, it would have said so in plain language. If it had intended to import the English system into our jurisprudence, it would have manifested its intention in unambiguous words, which would have sounded a warning to all future litigants that litigation thereafter was to be at the peril of paying all counsel fees in case of failure. If it had intended that the word "costs" should include "allowances", under the guise of a taxation of costs as between solicitor and client, or otherwise, it seems certain that language would have been employed which would have left no room for doubt as to its purpose.

That the word "costs" does not include attorneys' fees was authoritatively decided by this Court in *Sioux County* v. *National Surety Co.,* 276 U. S. 238. There, the action was on a surety bond, under a statute of Nebraska which provided that in such actions "a reasonable sum as an at-

torney's fee in addition to the amount of his recovery" may be taxed as a part of the "costs". The circuit court of appeals for the eighth circuit held (16 F. (2d) 688) that attorneys' fees were not a part of the "costs" provided for in R. S. sec. 823, 824, and, therefore, could not be allowed as costs in a federal court. This Court, upon appeal, agreed with the lower court that such attorneys' fees are not and cannot be a part of the taxable costs prescribed by the federal statute. This Court did, however, give effect to the Nebraska statute by holding that the amount of the attorney's fee could be included in the judgment. It said (p. 243):

> That the statute directs the allowance, which is made to plaintiff, to be added to the judgment as costs are added does not make it costs in the ordinary sense of the traditional, arbitrary and small fees of court officers, attorneys' docket fees and the like, allowed to counsel by Rev. Stat. sec. 823, 824.
>
> The present allowance, *since it is not costs in the ordinary sense,* is not within the field of costs legislation covered by Rev. Stat. sec. 823, 824. That the particular mode of enforcing the right provided by the state statute—i. e., by taxing the allowance as costs—is not available to the federal courts under Rev. Stat. sec. 823, 824 does not preclude the recovery. Since the right exists, the federal courts may follow their own appropriate procedure for its enforcement by including the amount of the fee in the judgment.

In two other decisions of this Court, hereafter referred to (*Oelrichs* v. *Williams,* 15 Wall, 211, and *Tullock* v. *Mulvane,* 184 U. S. 497), it was held that "costs" did not include attorneys' fees. Those actions were upon injunction bonds which were conditioned to pay to defendants "all

costs and damages". In both cases it was held that counsel fees, incurred in securing a dissolution of the injunction, did not come within the scope of either "costs" or "damages".

In several instances the lower courts have held that the word "costs" in a decree or in a statute is to be construed as including only taxable costs, as distinguished from allowances.

In *Kell* v. *Trenchard*, 146 Fed. 245 (circuit court of appeals, fourth circuit), the mandate of the court of appeals provided that the "costs" of the case in both the appellate and the lower court should be borne equally by the appellant and the appellees. In a taxation of costs pursuant to this direction, the lower court included an allowance to the receiver as a part of the costs properly to be divided. The action of the lower court in including the allowance to the receiver was appealed from, and reversed on appeal, the appellate court saying (p. 247):

> In decreeing the division of costs in this court and the court below was meant only *the ordinary taxable costs of the litigation*, and not such charges and expenses as the costs of the receivership and payments and allowances to receivers; those being costs properly appertaining to the receivership, and chargeable against the *property* in the receiver's hands. Ferguson *v.* Dent (C. C.), 46 Fed. 88; Elkhorn Oil & Gas Co. *v.* Foster, 99 Fed. 495, 39 C. C. A 615.

To the same effect are:

Doddridge County Oil & Gas Co. v. *Smith*, 173 Fed. 386;
United States v. *Wilson*, 193 Fed. 1007;
United States v. *Smith*, 240 Fed. 756.

If the Trust Company felt that it was entitled to have the opinion and mandate of this Court broadened so as to include allowances in the nature of costs as between solicitor and client, it should have made an appropriate application to the Court for that purpose, and before the expiration of the term. After the lapse of the term, the provision relative to costs could not be altered (*Fairmount Creamery Co.* v. *Minnesota,* 275 U. S. 70, 73).

II.

We earnestly contend that the lower court committed a grave error (1) in holding "that the federal courts of equity have jurisdiction to allow in proper cases costs 'as between solicitor and client,' " as such jurisdiction is exercised by the English Court of Chancery, and (2) in applying that erroneous principle to the facts in this case.

The lower court reached the conclusion, which is quoted in the above heading, and which, we contend, is wholly erroneous, by two successive steps; first, it asserts (28 F. (2d) 240) that the English courts of chancery have for several centuries possessed jurisdiction to award costs as between solicitor and client; and, secondly (p. 241), that the United States courts of equity at the time of their creation became endowed with, and now possess, the powers, including that over costs, possessed by the English chancery court.

We confidently contend that the English system of taxation of costs as between solicitor and client has never been adopted in this country; and, furthermore, that if it has ever been the law here, which we do not admit, it has been expressly repudiated, by the substitution therefor of the

Act of Congress of 1853, providing for the taxation of an attorney's fee of $20 "and no other" as costs on final hearing in equity. This Court and the lower courts have uniformly applied this statute as the settled rule in federal jurisdiction.

Space does not permit an extended discussion of the English system of taxation of costs. It is fundamentally different from our own. Under it, attorneys' fees or solicitors' fees, which are fixed by law, are taxed against the losing party in every case, whether at law or in equity. Costs as between party and party include attorneys' fees of the adversary. Costs as between solicitor and client include a somewhat larger proportion of the actual expenditures of the successful party than is allowed in taxation as between party and party.

In modern practice, however, the English system of taxation as between solicitor and client "gives little more than a taxation as between party and party" (*Giles* v. *Randall,* 1 K. B. D. 290, 296; *Daniell's Chancery Pleading & Practice,* Vol. 2, 6th Am. Ed., star page 1376, note 1).

For the purpose of showing that the English system has not only never been established in this country, but that it has been definitely and finally repudiated by our courts, we will briefly trace the historical development of the subject of taxation of attorneys' fees as costs from the beginning of our government down to date.

Early statutes and rules of court.

On August 8, 1791, "the Chief Justice, in answer to the motion of the Attorney General, made yesterday, informs him and the bar, that this court consider the practice of the courts of king's bench, and of chancery, in England, as

affording outlines for the practice of this court; and that they will, from time to time, make such alterations therein as circumstances may render necessary'' (*Rules and Orders of the Supreme Court of the United States,* 2 L. Ed.). This in 1822 was expanded into Equity Rule 33, and in 1842, into Equity Rule 90, which latter was dropped from the equity rules February 1, 1913.

The lower court, in its opinion, apparently takes the view that the effect of these equity rules was to import into our practice the English doctrine of taxation of costs as between solicitor and client. We contend that this cannot be so, and proceed to state our reasons.

Congress, by Act of September 29, 1789, provided that the rates of fees in the circuit and district courts of the United States, in equity cases, should be in accordance with those allowed by the chancery court of the state. The Act of May 26, 1790, continued the Act of 1789 until the end of the succeeding session, and it was again continued by the Act of February 18, 1791, until the end of the next session. The Act of March 1, 1793, provided for the taxation in the circuit courts of the United States of such attorneys' fees and counsel fees ''as are allowed in the Supreme or Superior Courts of the respective states''. The Act was continued another year by the Act of February 25, 1795, and was again continued by the Act of March 31, 1796, for the term of two years, and from thence until the end of the next session of Congress thereafter (Report of Mr. Justice Nelson, 1 Blatchford C. C. 652).

Is it not entirely clear that Congress, in these enactments, was declaring its own policy with respect to the taxation of attorneys' fees as costs? It deliberately adopted the policy of applying the rules of the state court where the federal court was sitting, as the rules in its own court.

If it had desired to adopt the English practice, in that behalf, it seems certain that it would have said so. At that period in the development of our judicial system, the extent to which the forms, precedents and practice of the mother country should be followed, was receiving the earnest attention of Congress. Its failure to adopt the English practice can only be regarded as an intentional repudiation of it in favor of its own rules.

Early decisions of this Court.

The first case in which there was presented to this Court the question of whether or not attorneys' fees might be taxed as costs, was *Arcambel* v. *Wiseman,* 3 Dall. 306, 1 L. Ed. 613, decided in 1796. In that case an allowance of $1,600 as counsel fees had been included as a part of the damages allowed by the circuit court, but this Court ordered the disallowance of this item, saying:

> We do not think that this charge ought to be allowed. The general practice of the United States is in opposition to it; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, until it is changed, or modified, by statute.

Then followed *The Apollon,* 9 Wheat. 362, decided in 1824, and *Canter* v. *Ins. Co.,* 3 Pet. 307, decided in 1830, in both of which the decision was rendered by Mr. Justice Story, and in both counsel fees were allowed. Both cases, however, were explained, as we shall see later, as having been decided as they were because the Act of 1853 was not then in force. In *Day* v. *Woodworth,* 13 How. 363, decided in 1851, the court held that attorneys' fees could not be included in an award of exemplary damages.

Prior to the statute of 1853, the practice with respect to the taxation of attorneys' fees as costs may be said to have lacked uniformity; the general rule being that such costs were to be taxed in accordance with the varying practice in the state where the court was sitting. But this lack of uniformity is in itself conclusive evidence that the English system had not been adopted, for had that system been adopted, we would find uniformity, instead of uncertainty. The report of Mr. Justice Nelson, above referred to, was published in 1842, and disclosed not only the lack of uniformity in federal court practice, but the necessity for some uniform rule applicable to federal courts wherever sitting.

The Act of 1853, and its construction by this Court.

The Act of 1853 (28 U. S. C. A. sec. 571, 572) was intended to meet this demand for uniformity. It provided that certain specified fees "and no other" shall be taxed and allowed to attorneys, solicitors, and proctors in the courts of the United States, and that on a final hearing in equity or admiralty, a docket fee of twenty dollars shall be taxed. It is as follows:

> Sec. 571. The following fees and no other shall be taxed and allowed to attorneys, solicitors, and proctors in the courts of the United States, and to district attorneys, except in cases otherwise expressly provided by law. But nothing herein shall be construed to prohibit attorneys, solicitors, and proctors from charging to and receiving from their clients, other than the Government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective States, or may be agreed upon between the parties.
>
> Sec. 572. On a trial before a jury, in civil or criminal causes or before referees, or on a final hear-

> ing in equity or admiralty, a docket fee of $20: *Provided,* That in cases of admiralty and maritime jurisdiction, where the libelant recovers less than $50, the docket fee of his proctor shall be but $10.

This statute is in itself conclusive evidence of the complete repudiation of the English practice, if it ever existed in this country. Our courts thereafter recognized it as once and for all settling the question of the taxation of costs, and limiting the taxation of attorneys' fees in the stipulated manner.

The effect of the statute was before this Court in 1869, in *The Baltimore,* 8 Wall. 377. The court there reviewed not only the prior legislation, referred to above, but the practice which had prevailed prior to the Act of 1853, pointing out the lack of uniformity. It held, in effect, that the Act was intended to standardize the practice in federal courts; that while attorneys might charge their clients reasonably for their services, nothing could be taxed as costs against the opposite party, as an incident to the judgment, except the costs and fees prescribed and enumerated. It also held that *The Apollon,* 9 Wheat. 362, and *Canter* v. *Ins. Co.,* 3 Pet. 307, which were cited in the brief of the appellees, were inapplicable because decided before the Act of 1853. The Court said (p. 392):

> Fees and costs, allowed to the officers therein named, are now regulated by the Act of the 26th of February, 1853, which provides, in its 1st section, that in lieu of the compensation now allowed by law to attorneys, solicitors, proctors, district attorneys, clerks, marshals, witnesses, jurors, commissioners and printers, the following and no other compensation shall be allowed.
>
> Attorneys, solicitors and proctors may charge their clients reasonably for their services, in addi-

tion to the taxable costs, but nothing can be taxed as cost against the opposite party, as an incident to the judgment, for their services, except the cost and fees therein described and enumerated. 10 Stat. at L. 161. They may tax a docket fee of $20 on a final hearing in admiralty, if the libelant recovers $50, but if he recovers less than $50, the docket fee of the proctor shall be but $10. The Canton, 21 Law, Rep. 473; The Liverpool Packet, 2 Sprague 37; The Connestoga, 2 Wall. Jr. 116.

Reference is made to two cases where counsel fees were allowed, but it is a sufficient answer to those cases to say, that they were decided before the Act of Congress under consideration was passed. They do not, therefore, furnish the rule of decision in the case before us.

This decision would seem definitely to settle any question of the taxation of attorneys' fees as costs in excess of the amounts named in the statute. It is difficult to imagine the English doctrine as surviving after this decision.

But if there was any lingering doubt upon this subject, it was completely dispelled by the decision of this Court in *Oelrichs* v. *Williams,* 15 Wall. 211. This was an action on an injunction bond. The condition of the bond was that the obligor "should pay and satisfy all costs and damages that may accrue to the obligees, or either of them, by reason of said injunction, in case the same shall be denied". The question was squarely presented, therefore, as to whether counsel fees were included in the words "costs and damages". The injunction was in effect for a period of four years, eight months, sixteen days. Doubtless, it presented circumstances of great hardship. Both the master and the lower court allowed counsel fees, paid in securing a dissolution of the injunction, as a part of the

costs and damages covered by the bond. This was reversed. The Court, after referring to *Arcambel* v. *Wiseman, supra,* and other cases, said (p. 231):

> The point here in question has never been expressly decided by this court, but it is clearly within the reasoning of the case last referred to, and we think is substantially determined by that adjudication. In debt, covenant, and assumpsit, damages are recovered, but counsel fees are never included. So in equity cases, where there is no injunction bond, only the taxable costs are allowed to the complainants. The same rule is applied to the defendant, however unjust the litigation on the other side, and however large the *expensa litis* to which he may have been subjected. The parties in this respect are upon a footing of equality. There is no fixed standard by which the honorarium can be measured. Some counsel demand much more than others. More counsel may be employed than are necessary. When both client and counsel know that the fees are to be paid by the other party there is danger of abuse. A reference to a master, or an issue to a jury, might be necessary to ascertain the proper amount, and this grafted litigation might possibly be more animated and protracted than that in the original cause. It would be an office of some delicacy on the part of the court to scale down the charges, as might sometimes be necessary.
>
> We think the principle of disallowance rests on a solid foundation, and that the *opposite rule is forbidden by the analogies of the law and sound public policy.*

This comprehensive ruling should be accepted, we respectfully submit, as completely settling and disposing of the question of the taxation of counsel fees, as costs, in this country. Such costs may not be taxed in equity cases,

even where the litigation is unjust, on one side or the other, and however large the expense may be. The reasons are given. The parties stand upon a footing of equality. There is no fixed standard, in this country, by which counsel fees can be determined, as there is in England. Some counsel demand much more than others, and more counsel may be employed than are necessary. There is great danger of abuse if it be known in advance that fees, unregulated by law, are to be paid by the other party. Additional litigation would be necessary to determine the fees to be taxed. Counsel fees do not come within the designation of "costs," nor of "damages." Their disallowance rests on a solid foundation, and the opposite rule is forbidden by sound public policy as well as by the analogies of the law.

This Court, in subsequent cases, has assumed, without further re-examination of the question, that this decision has settled the law in this country. In *Tullock* v. *Mulvane*, 184 U. S. 497, the action was upon an injunction bond, which, as before, was conditioned to pay to defendant "all costs and damages." It was again insisted that attorneys' fees were properly allowed as an item of cost or damage upon the bond, and again denied. The Court said (p. 511):

> ... it remains only to consider whether the attorneys' fees were properly allowed by the court below as an element of damages on the bond. That they were not *is settled.*

The Court then refers to *Oelrichs* v. *Williams, supra,* and concludes with the statement:

> It follows from what we have stated that there was error committed in allowing the recovery of attorney's fees as an element of damage upon the bond in question.

The question next came before this Court in *Missouri, K. & T. R. Co.* v. *Elliott,* 184 U. S. 530, and was disposed of briefly in the following statement:

> Having thus disposed of the question of jurisdiction, we come to the merits of the case. It suffices to say, for the reasons given in the opinion in Tullock *v.* Mulvane, before referred to, 184 U. S. 497, that there was error committed by the Kansas City court of appeals in affirming the action of the trial court in allowing, in the judgment by it rendered, attorneys' fees as an element of damage upon the injunction bond contrary to the controlling rule on this subject enunciated by this court, by which the courts of the United States are governed in requiring the execution of such instruments.

The lower court, in its opinion in this case, after referring to some of the cases above cited, among them, *Arcambel* v. *Wiseman, The Baltimore, Oelrichs* v. *Williams,* states that "such refusals (to tax attorneys' fees as costs) were not based upon any lack of power in the court, but because it was not deemed wise policy to allow attorneys' fees to be taxed as costs in ordinary equity cases".

We respectfully submit, however, that it was a lack of "power" to impose attorneys' fees as costs which impelled this Court to decide as it did. This is made entirely plain in *Missouri P. R. Co.* v. *Larabee,* 234 U. S. 459, where the question arose over the imposition of attorneys' fees by a state court in respect of an appeal prosecuted to this Court. The question is there stated by the Court (p. 468):

> First. The question of the *power* of the court to make the allowance for professional services rendered in this court on the former writ of error.

It will be noted that the Court was here discussing the *power* to make the allowance, and not the equitable principles which control some allowance which it has the power to make. The Court held against the existence of the power, as follows:

> There can be no doubt that, tested by the general principles of law controlling in this court, by the *statutes of the United States* relating to the subject, or the rules of this court concerning the same, the award for the attorneys' fees in question was *absolutely unwarranted.* We do not stop to review and expound the settled line of authority demonstrating this result because it would be wholly superfluous to do so, as the principles have been so long the settled rule of conduct in this court, and are so elementary as to require not even a reference to the cases. Some of the cases, nevertheless, we cite: Arcambel *v.* Wiseman, 3 Dall. 306; Day *v.* Woodworth, 13 How. 363, 372; Oelrichs *v.* Spain (Oelrichs *v.* Williams), 15 Wall. 211, 230, 231; Tullock *v.* Mulvane, 184 U. S. 497, 511 *et seq.*

It will be noted that the cases cited above are the same cases to which we have referred heretofore. They are referred to in the opinion of this Court as establishing a settled line of authority demonstrating the lack of *power* to tax counsel fees as costs. The prior interpretation of the Act of 1853 is reaffirmed.

The right and duty of the chancellor in proper cases to make "allowances" for expenses and counsel fees within the rule of *Trustees* v. *Greenough,* 105 U. S. 527, is well recognized, and is not at all in conflict with the views above expressed with respect to the taxation of attorneys' fees and other expenses, as costs, in cases like the one under consideration. It is a general principle that the trust

estate must bear the expenses of its administration. It is also a general principle that where one of many parties having a common interest in the trust fund, at his own expense takes proper proceedings to save it from destruction and to restore it to the purposes of the trust, he is entitled to reimbursement, either out of the fund itself or by a proportionate contribution from those who accept the benefit of his efforts. This rule, however, has, we contend, no application whatsoever to the present case. Its inapplicability to the facts in this record is discussed under subsequent headings.

Decisions of circuit courts of appeal.

The federal courts of appeals have, without exception, followed the statute of 1853, and the rule established by this Court in the foregoing cases, that, in the absence of authorizing statute, attorneys' fees in excess of $20 may not be taxed as costs as between solicitor and client, to be paid by one of the parties to the suit. The decision of the lower court is in conflict with the decisions of circuit courts of appeal of other circuits, now to be referred to.

In *McIntosh* v. *Ward,* 159 Fed. 66, the court of appeals of the seventh circuit held that attorneys' fees could not be taxed as costs in a partnership accounting case. In its opinion the court said, in reference to the allowable items of expense:

> Such allowances were of statutory origin. Our statute of 1853 . . . provides what shall, as costs, "be included in and form a portion of a judgment or decree against the losing party." . . . In our opinion the discretion of a court of equity does not authorize it to require one party . . . to pay to the other, under the name of costs, items paid from the fund for

> services and expenses in administering a suit properly in court, nor any other items not within a fee bill act.

Fraser v. *Cole,* 214 Fed. 556, was a suit by a legatee to enforce his claim against an executor and reach real estate fraudulently conveyed by her. The district court added to the decree an allowance of $1,000 solicitor's fees. The court of appeals for the seventh circuit said:

> No law of Illinois warranted the increase of Grace Fraser's indebtedness by such an addition. . . . Nor can equity in a suit upon a creditor's bill or a vendor's lien bill enlarge the defendant's debt in that way.

Leary v. *United States,* 257 Fed. 246, was a fraud case in which the successful party sought to have his attorneys' fees taxed against the losing party. The court of appeals for the fourth circuit said:

> The costs that can be taxed against the losing party . . . are little more than nominal, and the winner is therefore out of pocket for the fees of his counsel. If this be unjust to the one found to be in the right, it is because the law gives him only the amount of his recovery and the scanty sum allowed as taxable costs.

In *Motion Picture Patents Company* v. *Steiner,* 201 Fed. 63, the district court allowed an attorney's fee of $150.00 in each of two cases because of the vexatious conduct of plaintiff's counsel in the litigation. The court of appeals for the second circuit held that an attorney might be compelled to pay certain costs for vexatious conduct by virtue of Section 982 of the statutes, but that the costs could not be taxed against the client.

In *Marks* v. *Leo Feist*, 8 Fed. (2d) 460, attorneys' fees were taxed as costs in a copyright case. The court of appeals for the second circuit held that while such fees were taxable under the copyright law:

> The general rule, which is subject to some exceptions, of course, is that each party to a litigation must pay his own counsel fees, no matter how unjust the litigation may have been, or how great may have been the *expensa litis* (citing the Arcambel and Oelrichs cases).

We respectfully contend that the decision of the lower court is contrary to the statute, contrary to the decisions of this Court, and contrary to the decisions of federal courts of appeal in other circuits.

Counsel fees incurred after the decree of June, 1910.

We earnestly contend that, for the reasons above stated, the law does not authorize or permit the taxation against petitioner of *any* of the attorneys' fees or other expenses of the Trust Company during the entire period of this litigation. For the purpose, however, of bringing into impressive relief what we regard as one of the glaring errors of the lower court, we desire, for the moment, to lay to one side all other controverted matters, and to direct the attention of the Court to the proceedings in this case following the final decree of June, 1910—the period during which a considerable portion of the Trust Company's liability for attorneys' fees were incurred. The grave injustice of imposing these expenses upon petitioner appears to us to be so plain and obvious that a brief reference to the uncontradicted facts should suffice.

The decree of the lower court, in June, 1910, was against the Trust Company, and, accordingly, it appealed to the

circuit court of appeals. As has been heretofore pointed out, the issue—the personal liability of petitioner for the debt of the Belt Company—was an exceedingly difficult one, and involved in much doubt and uncertainty. The *Boyd Case* (228 U. S. 482, April, 1913) had not then been decided. Finite minds could not tell what the decision in our case would be. The circuit court of appeals recognized the serious and difficult nature of the controversy when it permitted two arguments and handed down two elaborate opinions. This Court held, May 11, 1914, that the nature of the case was such as to warrant the grant of its writ of certiorari, in case an appeal did not lie. The decree of the circuit court of appeals was affirmed by this Court; the Chief Justice and one Associate Justice dissenting.

Upon what conceivable principle can petitioner be condemned to pay the Trust Company's attorneys' fees and other expenses, involved in its appeal to the circuit court of appeals, and involved in petitioner's appeal to this Court, to determine this liability issue, which the Trust Company itself injected into the litigation in 1905, in its answer to the intervening petition of petitioner? What warning was there in the books of text writers or in the decisions of the courts, saying to petitioner, in effect: "If you resist the Trust Company's appeal to the circuit court of appeals, or if you appeal from that court to the Supreme Court, you do so at your peril of being mulcted for the attorneys' fees and other expenses of the Trust Company, in the event that you are unsuccessful"?

What becomes of the guaranty, declaratory of the public policy in the jurisdiction where the litigation was carried on, that "The courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice

should be administered without sale, denial or delay" (Const. Mo., Art. II, Sec. 10).

The right of free access to the courts is fundamental in our theory of Government. In *Straus* v. *Victor Talking Mach. Co.*, 297 Fed. 791, 798 (circuit court of appeals, second circuit), it is said: "Free access to the courts must neither be denied nor penalized."

In *Missouri Pacific R. Co.* v. *Larabee*, 234 U. S. 459, the right of a state to impose attorneys' fees upon the losing party in an appeal to this Court was denied on the ground that if that were permitted, "the right to freely seek access to the Supreme Court of the United States would cease to exist."

In *Wetmore* v. *Mellinger*, 64 Iowa, 741, it is said:

> The courts are open and free to all who have grievances and seek remedies therefor, and there should be no restraint upon a suitor, through fear of liability resulting from failure in his action, which would keep him from the courts.

The imposition of the Trust Company's expenses incurred following the final decree of June, 1910, can only be justified upon the assumption that petitioner, instead of resisting the Trust Company's appeal to the circuit court of appeals, should have filed a confession of error, and permitted a perfunctory reversal of the decree; and, further, upon the assumption that petitioner should have refrained from prosecuting an appeal from the circuit court of appeals to this Court, although this Court stood ready to issue its writ of certiorari if the appeal did not lie. Such an assumption passes the limits of reason. Petitioner would have betrayed its stockholders if it had taken any other course than the one it pursued. Upon what theory should it now be penalized?

III.

The fact that complainant sought unsuccessfully to charge the Trust Company with the duties and obligations of a trustee, does not entitle it to the taxation of costs as between solicitor and client.

The complaints charged that the Trust Company at all times dominated and controlled the Belt Company and the other corporations officered by it, and that by reason of such domination and control, the Trust Company assumed towards them the position and obligations of a trustee. In the Cambria bill, it is alleged that the Trust Company did "assume the position of trustee and agent in managing and disposing of the bonds, stocks, funds, and other assets of said railroad companies, and auxiliary companies, in trust and for the use and benefit of the parties who might become concerned or interested therein; . . . including particularly creditors thereof and your orator" (Rec. II, 6). The Trust Company in its answer to the Cambria bill denied, as above stated, that it assumed the position or the obligations of a trustee (Rec. II, 42).

The issue was thus made by the pleadings. On the one hand, it was alleged that the Trust Company has assumed the position and relation of a constructive trustee, and, on the other hand, this was emphatically denied. The master found that the Trust Company did not thus assume the position and obligation of a trustee, and his finding was approved by the district court.

In these circumstances, the court of appeals held, erroneously, we contend, that the Trust Company was entitled to the taxation of costs as between solicitor and

client, or that an allowance should be made in its favor by analogy to the law giving trustees their disbursements in the execution of their trusts.

The law is plain, we respectfully submit, that the rule imposing attorneys' fees as costs in favor of a trustee has no application. The reason is that there is no trustee, no *cestui que trust,* and no fund that is being handled or administered. The parties therefore occupy the position of ordinary litigants.

The applicable rule was thus stated in *Perry on Trusts,* 6th Ed., 1911, sec. 896:

> But where plaintiffs bring a bill against defendants for the purpose of creating a trust fund—as if they bring a bill to convert defendants into trustees under a constructive trust, or to compel the defendants to hold certain property in their hands for plaintiffs—the defendants can have costs only as between party and party, if the plaintiffs fail; for the suit in such case turns out to be between strangers.

In *Lewin on Law of Trusts,* 12th Ed., p. 1267, it is said:

> But if plaintiffs take proceedings for the purpose of creating a fund, of which the defendants would be trustees for the plaintiffs, if the plaintiffs succeeded, but the plaintiffs fail, the defendants are entitled as against the plaintiffs to costs only as between party and party.

In *Tiffany & Bullard on Trusts and Trustees,* p. 714, it is said:

> As these costs taxed between solicitor and client are termed trustee's costs, it follows that they will not be taxed in a case where that relation or character does not exist.

It is likewise the rule that where a trustee disclaims his trust, he is entitled only to his costs as between party and party. (*Godefroi's Law of Trusts*, Third Ed. (London, 1907), p. 28; *Daniell's Chancery Practice*, Ed. 7 (1901), Vol. 1, p. 1011; *Mohun* v. *Mohun*, 1 Swanston's Reports (1818), 201; *Bulkeley* v. *The Earl of Eglington*, 1 Jur. (1885) 994; *Norway* v. *Norway*, 2 Mylne & Keen's Rep. (1834), 278; *Heap* v. *Jones*, 5 W. R. (1856), 106; *Bray* v. *West*, 9 Simons Rep., 429.)

The same considerations apply to so much of the intervening petition of petitioner as complains of the Trust Company's action with respect to the Union Terminal bonds. A complete answer to the Trust Company's claim for indemnity is found in the fact that the intervenor sought to impose upon the Trust Company the duties and obligations of a trustee with respect to the use of the Union Terminal bonds and their proceeds. It invoked the provisions of the mortgage itself, and the implications thought to arise from the terms of the mortgage, to establish this relationship, and so to make the Trust Company a trustee with respect thereto.

The Trust Company, although a trustee in the mortgage of the Union Company, in its answer denied the existence of any such trust relations, either by law or the express terms of the mortgage, and specifically denied that any duty rested upon it to see that, as said bonds were sold, the proceeds were used in the construction, completion and equipment of the railroad. This defense was sustained by the master (Rec. II, 876).

We have, therefore, on the part of the intervenor, an assertion of a trust relation with respect to the disposition of the bonds and their proceeds, and, on the part of the

Trust Company, a denial that any such trust relationship existed. The master found this issue in favor of the Trust Company, and thereby it was established that no such trust relation existed, or ever had existed.

In other words, the intervenor sought to hold the Trust Company to the duties and obligations of a trustee, in respect of the disposition of the bonds, or their proceeds, and failed to establish its claim in that behalf. The trustee relationship not being established, the authorities, referred to above, hold that there is no ground for a claim of indemnity.

IV.

The litigation conducted by the Trust Company for its own benefit with respect to the collateral security, does not entitle it to the taxation of costs as between solicitor and client.

The Trust Company, on March 31, 1899, the day before the receivership of the Gulf Company, took from the Belt Company, or received from it, the collateral security in question, consisting of stocks, etc.—everything, in fact, which the Belt Company had at the time, which could be used as collateral. All of this, or its proceeds, the Trust Company proceeded to hold as security for the debt which it alleged the Belt Company owed to it. When this litigation came on, on September 6, 1900, receivers were appointed of all the assets of the Belt Company (Rec. II, 29), of every kind and nature. Later a receiver was appointed for the Northern Townsite Company (Rec. II, 914), whose stock was a part of the collateral in question; and a receiver was also appointed for the Central Improvement

Company (Rec. II, 162, 163), whose stock was also a part of the same collateral. A receiver was also appointed for the Elevator Company (Rec. II, 162).

The litigation between the Cambria Company, the Belt Company and its receivers, on the one hand, and the Trust Company, on the other, concerned solely the question of debt or no debt as between the Belt Company and the Trust Company. As this should be determined, the collateral or its proceeds automatically would remain with the Trust Company or return to the Belt Company or its creditors, the Cambria Company.

It cannot be contended that the Trust Company, in litigating the issue of debt or no debt, was acting in the interest of the Belt Company, which was the pledgor of the collateral. It was acting adversely to the Belt Company, as well as to petitioner, which was the owner of the stock of the Belt Company. *It was acting solely in its own interest, to protect its own individual claim.*

Nor was it seeking to protect the collateral security itself, for it needed no protection. It simply remained throughout the litigation as the pawn or pledge to be awarded to the successful party when the litigation should end. The only dealing by the court with the collateral during the entire litigation was the sale by the Trust Company, under orders of the court, of certain Northern Connecting bonds and coupons, for which $40,001.25 was realized and held by the Trust Company in special deposit until the final decree, in which it was ordered to be applied upon the Trust Company's debt (Rec. II, 907). That part of the collateral which possessed value, consisting of the property of the Central Improvement Company and, in lesser degree, of the Northern Townsite Company, was be-

ing administered by the receivers of those properties, under the direction of the court (Rec. II, 914).

The Trust Company performed no services whatsoever for the benefit of the pledgor, or for the benefit of the collateral itself. It was performing no duties as pledgee or trustee. Its services were rendered, and its efforts expended, in protecting its own interest. In these circumstances, there is, we respectfully submit, no rule of law which permits the Trust Company, as trustee or pledgee, to impose its disbursements for counsel fees upon its adversary.

It is, of course, the ordinary rule that a pledgee has a lien on the property for any expenses, including attorneys' fees reasonably incurred by him in keeping and caring for the property pledged, protecting it against liens, taxes, assessments, etc. But our contention is that it has no application whatsoever to the facts in this case.

When we examine the reason of the rule which allows a pledgee attorneys' fees for the protection of pledged property, it becomes clear that the Trust Company does not come within it. The foundation of the rule is that the pledgee, after a sale of the pledged property, must credit the pledgor with the net amount realized by him from the proceeds. If he has been put to expense in order to protect the property pledged, for illustration, if he has been compelled to pay an incumbrance to prevent a foreclosure, or forced to defend the pledgor's title for the benefit of the pledgor, the gross proceeds must be reduced to the extent of the expense incurred in the doing of one or all these things, because done on behalf of the pledgor and for his benefit. The pledgee has the property in his possession; the pledgor is not in position to defend it against adverse claims or to protect it generally. The pledgee, therefore,

is authorized, in law, to act for the benefit of the pledgor, as his quasi-agent, in doing what the pledgor would have done had he been in possession of his property and in position to defend it.

Where, as here, suits are undertaken by the pledgee which are of no benefit to the pledgor, the reason for the rule ceases, and the rule itself has no application.

The rule and the reason for it are recognized and set forth in *Work* v. *Tibbits,* 87 Hun 352, 34 N. Y. Supp. 308.

Other decisions to the same effect are:

Wolf v. *Am. Trust & Savings Bank,* 214 Fed. 761 (7th Circ.);

Smith v. *Equitable Trust Company,* 215 Pa. 413, 62 Atl. 591;

Willard v. *White,* 56 Hun 581, 10 N. Y. Supp. 170.

V.

It is contrary to both reason and authority to base an allowance of counsel fees in this case upon the assumption that the Trust Company uncovered and brought into the constructive possession of the court a fund from which creditors of the Belt Company were entitled to be paid.

The lower court sought to justify the imposition of costs as between solicitor and client upon the assumption that "the Trust Company in the course of litigation uncovered and brought into the constructive possession of the court a fund from which creditors of the Belt Company were entitled to be paid." This, we contend, is clearly erroneous, and the error is susceptible of plain demonstration.

We insist, in the first place, that no fund was uncovered and brought into the constructive possession of the court,

within the meaning of the rule relied upon; and, furthermore, we insist that the case is governed by established principles which prohibit the allowance of counsel fees in the circumstances shown in this case. Before coming to a discussion of these questions, we call attention to the following considerations:

The decree of the lower court, which this Court affirmed, did not order the distribution of any fund to creditors. It merely awarded a personal judgment against petitioner, for the amount of the Belt Company's debt, with the return of the collateral upon payment of the debt, and with a sale of the collateral upon a failure to pay the debt. It was a personal judgment, which has long since been paid in full, in favor of the Trust Company, and this judgment did not inure to the benefit of any one else.

At no time did the Trust Company assert any claim except its own. There can be no pretense that it was acting for the benefit of any creditor. Its claim that petitioner was liable for the debt of the Belt Company is stated in its answer to the amended intervening petition of petitioner (Rec. II, 311), and is asserted solely in its own behalf. No mention is made of other creditors. It is in the nature of a legal claim, as distinguished from an action in equity. The suits in state courts upon the same cause of action (Rec. II, 502) were actions at law, triable by jury (R. S. Mo. 1919, sec. 1398).

Not only was the property of the Belt Company not a trust fund, in any substantial sense, but it was not in the possession of any court at the time the Trust Company asserted its claim in 1905, nor has it been in the possession of any court since that time. The property of the Belt Company, as appears from the Trust Company's answer (Rec. II, 295) was sold in November, 1901, at foreclosure

sale, and was purchased by petitioner, which ever since that time has had exclusive possession thereof. Manifestly, the stock of petitioner, which was issued in exchange for the stock of the Belt Company in the reorganization (if that be regarded as a "fund"), has never been in the possession of any court.

The lower court conceives that its decision with respect to the discovery and administration of a fund is supported by *Trustees* v. *Greenough*, 105 U. S. 527, and decisions of that character. Those cases hold, in general, that where one litigant, at his own expense, has either created, preserved or protected a fund, and others were entitled to claim, and did claim, the results of his labors, it was not fair that the persons who have taken the risk and cost and expense of the litigation should bear all the costs, but those who share in the fruits should bear their pro rata share of the expense. The rule goes no further than where meritorious results have actually been achieved, those who, by inaction, seek to await the result and escape all expense if the case be lost, but if successful, to share the actual benefits by receiving their portion of this success, should not be allowed to do so without contributing their share of the expense (*Buell Case*, 201 Fed. 762, 768).

The lower court's ruling is in direct conflict with the applicable authorities.

The total inapplicability of this rule to the case at bar is manifest, for several reasons, which we now point out:

(a) In this case, the court did not take charge of, administer, preserve or distribute any fund. It awarded a money judgment, in favor of the Trust Company and against petitioner, which has long since been paid in full. The rule of the *Greenough* case, which permits the making

of an allowance to counsel, does not apply. This, because the result of the litigation was "a general personal judgment, without segregating a fund in kind, and bringing its corpus into a court of equity for distribution."

This rule is stated clearly and emphatically by the Supreme Court of Missouri in *Johnson* v. *United Rys. Co.*, 247 Mo. 326, 350, 152 S. W. 362, the jurisdiction where this litigation was carried on. There, an action in equity was brought in behalf of complainant and other creditors to subject to the payment of their debts certain property which the debtor had transferred in fraud of creditors. There was a money judgment for complainant, and his motion for an allowance of attorney's fees was denied. The court held that the rule of the *Greenough* case had no application, saying:

> With cases of that ilk eliminated, there is left to consider a doctrine of equity, viz., that a trust fund of right should bear the expenses of its own administration. According to that rule, it has been held that where a transaction has been ripped up or a conveyance set aside for fraud and an estate has been uncovered and recovered, which, in equity, belongs to creditors, and that estate is held in the hollow of the chancellor's hand to be administered and distributed, attorney's fees may be allowed as part of the trust administration. White *v.* University Land Company, 49 Mo. App. 450; Trustees *v.* Greenough, 105 U. S. 527, 26 L. Ed. 1157; Central Railroad, etc. *v.* Pettus *et al.*, 113 U. S. 116, 28 L. Ed. 915; Woodward *v.* Mastin, 106 Mo. loc. cit. 364, 365, 17 S. W. 308. Agreeably thereto are an array of other cases industriously collated in Mr. Gillian's brief *pro se*. But it seems to us their doctrine does not apply here. This because the power of a court of equity is flexible enough to measure out relief in cases of this kind by a gen-

> eral personal judgment without segregating a fund in kind, and bringing its corpus into a court of equity for administration. Accordingly, here the judgment was a general money judgment against Railways Company. It stopped short at that point. It administered no fund. It took this form apparently by consent of the parties; at least, no one took exception to that feature. In such fix, the case falls within the doctrine of the general rule, viz., that in Missouri one litigant cannot be compelled to pay the attorneys' fees of another, either in equity or at law. Pickel *v.* Pickel, 147 S. W. 1059, not yet officially reported. It appears that Johnson contracted that Mr. Gilliam on top of a named percentage might have all attorney's fees the court allowed. That friendly turn added no virtue to movent's position. In that aspect it dealt with a bird (not in hand, but) in bush. We hold the motion well ruled.

This rule applies squarely to the case under consideration. Here, there was a general money judgment against petitioner. The decree stopped short at that point. It administered no fund. The case therefore falls within the doctrine of the general rule, in federal courts as well as in the state courts of Missouri, that one litigant cannot be compelled to pay the attorney's fees of another, either in equity or at law.

(b) Even where a creditor sues in equity for the benefit of himself and all intervening creditors, and obtains a decree for complainant and such creditors, *and the complainant and such creditors receive the full amount of their debts, with interest and taxable costs,* the complainant is not entitled to an allowance for solicitor's fees out of the surplus otherwise payable to the debtor.

In this case, the only creditor was the Trust Company. It did not sue for the benefit of other creditors who might come in and assert their claims. The Trust Company's debt became merged in a personal judgment, and that judgment, with interest, has been paid, and the taxable costs have been paid. Upon what theory of law is the Trust Company entitled to impose the burden of its counsel fees upon the surplus of the trust fund (assuming there was a trust fund), belonging to petitioner?

The authorities deny the validity of a claim of this nature. One such authority is *Huff* v. *Bidwell*, from the fifth circuit, 195 Fed. 430, where it is held:

> Where a judgment lien creditor sues in equity for the benefit of himself and all intervening creditors, and obtains decree for complainant and such creditors, and the defendant's property condemned and sold to satisfy debts exceeds the amount of debts and interest and costs, the complainant is not entitled to an allowance for his solicitor's fees out of the surplus otherwise payable to the debtor after full payment of all debts and costs.

The court said (p. 431):

> In creditors' suits, the underlying principle upon which those who do not appear as plaintiffs are charged with a proportionate part of the solicitors' fees is that the plaintiffs represented, and were suing for, the others; and this agency is generally shown by the appearance of the other creditors in court propounding their claims and claiming to share in the result of the suit. Lamar *v.* Hall & Wilberly, 129 Fed. 79, 83, 63 C. C. A. 521; Farmers' Loan & Trust Company *v.* Green, 79 Fed. 222, 24 C. C. A. 506; Hand *v.* Railroad Company, 21 S. C. 162. But the plaintiff in this case in no sense represented

> Huff, the defendant. The suit was not brought for his benefit. There was no just reason for seizing more of his property than would pay his debts, principal and interest, and the costs of suit. The property having been sold for a sum in excess, the proceeds necessarily came into court; but it was never the purpose of the suit to accomplish more than the collection of the debts and costs. *If no creditors had intervened, if the suit had been brought by the plaintiffs to enforce and collect their judgments only, is there any known principle upon which Huff could have been made responsible for the plaintiffs' solicitor's fees?* The intervening of the creditors may in such cases oblige them to contribute to the payment of the fee; but such interventions impose no obligation on the defendant who is sued. On principle, it seems to us that this fee cannot be added to Huff's indebtedness.

The sentence which we have italicized has accurate and precise application to this case. Here, no other creditors did intervene. The Trust Company sought to enforce and collect its claim only. Is there, therefore, any known principle upon which petitioner can be made responsible for the Trust Company's solicitors' fees?

In 20 Cyc. 825, the rule is thus stated:

> Upon a conveyance by a debtor being set aside as fraudulent, at the suit of a creditor, and a sale of the property being ordered, the creditor's attorney may be allowed a fee out of the proceeds; but such fee should be paid out of that part applicable to the demands of creditors, and not out of such balance as may come to the debtor after the liquidation of the debts proven and passed.

The foregoing quotation is cited and followed in *Pickel* v. *Pickel*, 243 Mo. 641, 665, in a case where, at the

suit of a wife, a conveyance by a husband was set aside as fraudulent as to her rights of maintenance.

To the same effect are: *Waggener* v. *Mars,* 27 S. C. 97, 2 S. E. 844, 846; *Miller* v. *Kehoe,* 107 Cal. 340.

If there had been in this case a fund in the possession of the court for administration and distribution (we insist there was not) the utmost limit of recovery by the Trust Company and other creditors (assuming there were others who intervened, although, in fact, there were not) would be the full amount of their respective claims, with interest, diminished by their proper proportion of any allowance made for counsel fees. The amount distributable to the Trust Company, plus its pro rata share of the allowance of counsel fees, might equal, but could not exceed, the amount of its claim, with interest. In other words, the Trust Company would pay its proportion of counsel fees out of its own distributive share; and the same would be true of other participating creditors.

The result is the same, in principle, where, as here, the Trust Company was the only creditor. The amount awarded it in this case was the full amount of its claim, with interest, and, accordingly, on both principle and authority, the Trust Company should pay its own counsel fees out of the proceeds of its judgment.

Certainly, there is no equity in requiring petitioner to pay out of its share of the trust fund (assuming, as before, that there was one), the expenses of the Trust Company's counsel, who rendered no service whatsoever for petitioner, and whose activities were wholly in conflict with its interest.

(c) Not only was the Trust Company awarded a money judgment, which has been paid, and not only does the Trust

Company seek to impose its claim for counsel fees upon the part of the trust fund (if there was one) remaining after the only creditor in the action has been paid in full, but the fact remains that the Trust Company's effort in this litigation was solely made in its own behalf, and in an endeavor to protect its own selfish interest; and the rule applies that in such cases there can be no allowance of counsel fees (*Groves* v. *Sentell,* 153 U. S. 465, 486; *Hauenstein* v. *Lynham,* 100 U. S. 483, 490; *Pike* v. *Cincinnati R. Co.,* 179 Fed. 97, 103; *Riddle* v. *Hudgins,* 58 Fed. 490, 494; *Boothe* v. *Coal Co.,* 72 Wash. 679; *Attorney General* v. *Ins. Co.,* 91 N. Y. 57; *Savage* v. *Sherman,* 87 N. Y. 285).

VI.

The statement in the opinion of the court of appeals that the entire litigation was vexatious, is entirely unwarranted and wholly unjust for the reasons, first, it finds absolutely no support in the record; secondly, it finds no support in the opinion and mandate of this Court (240 U. S. 166); thirdly, the record, as it stands, shows affirmatively the complete good faith of petitioner and the others associated with it during the entire litigation; and, fourthly, petitioner was wrongfully denied the right, when its good faith was challenged, to introduce evidence in its own behalf upon that issue.

It is greatly to be regretted that the court of appeals, in its third and last opinion, has felt impelled to characterize "the whole litigation" as of a "vexatious character." Many facts stand out in striking challenge to this extraordinary statement. They point out conclusively the error into which the court has fallen, due, doubtless, to the length

and complicated character of this litigation, with its accumulation of pleadings, issues, testimony, briefs, and collateral matters.

1. Neither the special master, the district court, the court of appeals in its first two opinions, nor this court has held, or even intimated, that the whole litigation, or any part of it, was trivial, insincere or vexatious. (We are not unmindful of what the court of appeals said in its second opinion and will deal with that later under its appropriate heading.) Nowhere in the entire litigation has that issue been made. It was sought to be made in the court of appeals at the reargument in 1913 (210 Fed. 722), but that court declined to entertain it.

2. The opinion of this Court in this case and its mandate (Rec. I, 465), which naturally superseded the opinion and mandate of the court of appeals (*First National Bank* v. *Chicago Trust Co.*, 207 U. S. 61, 66), contain no intimation that the litigation, or any part of it, was unjustified or unwarranted.

3. The record, as it stands, affirmatively shows the good faith of petitioner and those associated with it on its side of the litigation, and this will be pointed out in due course.

4. The district court, in its first opinion in 1923 (Rec. I, 691, 699), while disclaiming the expression of any opinion of its own upon the good faith of the litigation, erroneously said that the court of appeals had found that the Cambria suit was wholly baseless and unwarranted. This was the first time that any court had ever intimated that the good faith of petitioner or any of those associated on its side of

the litigation was questioned by it, and the intimation was entirely erroneous, as we point out later. Thereupon petitioner and the Cambria Company in December, 1923 (Rec. I, 33, 44) sought to file in the lower court a petition "for leave to introduce testimony proving that this litigation was instituted and conducted on the part of each of the complainants in entire good faith"; and this petition was wrongfully denied by the district court on the same day on which it was presented.

This petition was signed by four counsel who are officers of this Court, as well as of both lower courts, and was duly verified by one of them. It set out in detail the history of the institution and conduct of this litigation, from beginning to end, and asked leave to make proof, by oral and documentary evidence, of each and every statement therein contained. This petition appears in the record (Rec. I, 34-44). It is quite likely that this error would have been rectified later by the district court, but for its revised opinion, in 1926 (Rec. II, 704), denying the right to a taxation of costs as between solicitor and client, in view of which the investigation sought by the petition was doubtless regarded as unnecessary.

It is quite unnecessary to argue that if we are correct in any of the foregoing statements, the charge of instituting and continuing vexatious litigation will be promptly disapproved.

We regard the matter as of such importance that we are constrained to ask the indulgence of the Court while we point out, as briefly as possible, some of the features of the case bearing on this question.

There was ample justification for the filing of the Cambria bill and the ancillary bills.

The names of Louis C. Krauthoff and Frank Hagerman are signed to the bill of the Cambria Company, filed in September, 1900, and it is verified by the latter. The name of Thomas R. Morrow is signed as counsel to the ancillary bill of the Belt Company and its receivers, filed in 1901. These three gentlemen, in their lifetime, were accomplished and distinguished members of this Court, as well as of the lower courts, and stood foremost among the leaders of the bar of the State of Missouri. As is well known to some of the members of this Court, they were men of unquestioned integrity, and deserved and received the confidence and respect of both bench and bar. There is a strong presumption, which we feel the court of appeals might very properly have indulged, that lawyers of ability, character and standing, such as these gentlemen were, did not institute this action for purposes of vexation, or, reverting to the standard definition of a "vexatious suit" (*Bouvier's Law Dictionary, Rawle's Third Edition,* Vol. 3, p. 3399), "maliciously and without probable cause." To indulge such a presumption of honesty and upright conduct is but a small tribute to the memory of honorable and distinguished members of the bar. If, at this late day, any court is to impute unworthy motives to them, it should only be after the formality of a hearing, where those who may desire to speak for them may be accorded an opportunity so to do, and after the introduction of testimony so cogent and compelling as to lead to no other conclusion. Fortunately, however, the record itself speaks in their vindication.

The Cambria Company bill, filed in September, 1900, was an ordinary creditor's bill, expressed to be in behalf

of the complainant and other creditors, based upon an unsatisfied judgment for $100,000.00 against the Belt Company. Its allegations have been summarized in the preceding statement. It invoked the rule of the *Geddes* case, 254 U. S. 590, and sought to sift the transactions between the Belt Company and the Trust Company covering a period of some ten years, during which the latter, through interlocking officers and directors, was in a position to control, and, in fact, did control, the former, and was in a position to impose, and did impose, such bargains and transactions as it deemed to be in its interest. The filing of bills of this character is an everyday occurrence. The Cambria Company owed a duty to its stockholders to put forth every reasonable effort to collect its judgment against the Belt Company. The accounting proceeding offered the only available opportunity to achieve this result. We do not stop to argue that the filing of this bill under these circumstances was not a vexatious suit, but, on the contrary, the usual and ordinary procedure, dictated by the most obvious business considerations, for the purpose of collecting a debt judicially established to be due and owing to it.

It is intimated by the court of appeals (210 Fed. 717) that "the Cambria suit was in reality the suit of the Southern Company." There is nothing in the record, we respectfully submit, to support this statement, which we consider most unfair. We desire, if we may do so without impropriety, to refer to the rejected offer of proof in the district court (Rec. I, 36). If the evidence there sought to be introduced had been admitted, we are entitled to assume that the court's error would have been rectified.

The ancillary bill of the Belt Company and its receivers prayed for an accounting between the Belt Company and

the Trust Company, in substantially the same manner and form as the bill of the Cambria Company. It was filed pursuant to specific authority of the district court (Rec. I, 29). That court, on being advised of the "past dealings and relations" between the Trust Company and the Belt Company, felt that there should be an accounting between them. The court's authority to file a suit for an accounting was, under the circumstances, equivalent to a direction to do so.

The Trust Company itself apparently felt that an accounting between the companies was inevitable. It knew that if it sued to collect its notes or its open account, it would be met with a demand for an accounting. This is a fair inference from the facts, even without recourse to the affidavit (Rec. II., 1025).

In 1900 the Trust Company filed its answer to the Cambria bill, consenting to an accounting (Rec. II, 48). In November, 1901, it entered into a stipulation (Rec. II, 89), providing that an accounting should be had and expedited, and in its answer to the ancillary bill, the Trust Company offered to account as the court might desire (Rec. II, 155). The special master, in February, 1905, after the Trust Company's account had been presented by it, ruled that there should be an accounting (Rec. I, 14). In his final report he recognized the propriety of an accounting between the parties. He said (Rec. II, 760) that "the relations of the Belt and Trust Companies were exceedingly intimate, and of such character as not only to warrant, but perhaps to exact, the most scrutinizing investigation of any questionable transactions between them, at the instance of an interested party."

The court of appeals in its opinion refers with apparent criticism to the filing of the first amended and supplemental

ancillary bill. The fact is, as above stated (Rec. I, 15), that this pleading was filed at the request of the Trust Company, which had taken the position that, having submitted its account to the master, it devolved upon the complainant to surcharge and falsify the account (Rec. II, 1023). The bill was filed to satisfy this demand (Rec. I, 15). The court of appeals also refers, with apparent disapproval, to the filing of the second amended and supplemental ancillary bill. This pleading, as above stated, was filed by stipulation between the parties (Rec. II, 391), providing that the amended pleading and the answer should be filed simultaneously. This was after the taking of testimony was completed, and in order to conform the pleading to the proof (Rec. II, 1023). This is the usual and ordinary practice, and ought not to give rise to adverse criticism.

We have heretofore dealt with the charge of fraud and the allegations concerning the existence of trust or fiduciary relations, to which we beg to refer. We are wholly unable to see the slightest ground for criticism in connection with the filing of the ancillary bill or the amended ancillary bills.

Petitioner was fully justified in filing its intervening petition.

The petitioner's intervening petition was filed by agreement with the Trust Company, embodied in a stipulation (Rec. II, 164-166). Its counsel knew the nature of the claim to be asserted by petitioner, and was, for obvious reasons, anxious to have the petitioner a party to the action. The amended intervening petition was also filed by agreement, expressed by stipulation (Rec. II, 267-269). It will also be noted that the Trust Company expressly consented in the stipulation that the claim against it on account of its disposition of the Union Terminal Company bonds should be

litigated in this action; otherwise it is improbable that this claim could have been included in the intervening petition. Petitioner's claim, as above stated, was based upon the fact that it was the purchaser at foreclosure sale of the properties of the several companies, and thereby acquired the equitable title to the collateral held by the Trust Company, or the properties represented thereby. This claim was sustained by the special master and by the district court with respect to lands of Central Improvement Company, which were by far the most important and valuable item in the controversy. We respectfully invite counsel to point out any fact or circumstance indicating, directly or remotely, that this intervention was malicious or without probable cause, or that it constituted a vexatious suit or proceeding.

The evidence fully warranted the demand made for an accounting.

Aside from the order of the district court providing for an accounting, the stipulation consenting to an accounting, the Trust Company's offer to account, and aside from the master's ruling that an accounting should be had, and his further statement that by reason of the relations of the parties, a scrutinizing investigation of any questionable transactions was appropriate, there was, we earnestly and confidently contend, full and complete justification, arising from the plain and uncontroverted facts in the record, for the demand made upon the Trust Company for an accounting. The evidence adduced in the accounting proceeding is not in the record. The master's report, reviewing the pleadings and evidence (Rec. II, 579-888), is too voluminous to be analyzed in the limited space of this brief. We must, therefore, content ourselves with referring to but two of the large number of items involved in the accounting, the De Goeijen

item and the Stilwell contract, as representative of the general character of the proceeding. We feel that the Court will find no difficulty in reaching the conclusion that these two items, independently of all other considerations, afforded ample justification for the proceeding. They should, however, be viewed in the light of the evidence tending to prove the Trust Company's control over the Belt Company and its subsidiaries, which may be briefly summarized as follows:

The Trust Company's domination and control of the Belt Company and its subsidiaries.

There was substantial and persuasive testimony tending to prove the domination and control by the Trust Company over the Belt Company and its subsidiaries during the entire period covered by the accounting. This is summarized in the master's report (Rec. II, 593-608). Without going into detail, which space does not permit, it is entirely clear, we respectfully submit that there was ample justification for charging the existence of such domination and control as the complainants did in their bill; in fact, a finding in their favor would have been fully supported by the evidence.

It there appeared that the Trust Company for a number of years had been engaged in the business of organizing companies (593, 594). It had organized some forty corporations (597), including the Belt Company and its subsidiaries, all of which were regarded as Trust Company enterprises (593). A. E. Stilwell was at the head of the Trust Company, and the dominating and controlling figure in all these companies (593, 595, 596, 598, 602, 604). He said these companies were creatures of the Trust Company and were managed by it (596). The officers and directors of

the Trust Company were at the same time the officers and directors of the Belt Company and its subsidiary companies (597). When these companies were organized, the Trust Company would prepare the incorporation papers and pay the expense of incorporation, and the Trust Company's officers would decide who would be selected as officers in the newly incorporated company (598). The officers of all these companies were in the same building in Kansas City, Missouri, and were "like one family of officers and clerks (594). They were represented by the same counsel (594). The securities belonging to the Belt Company and its subsidiaries were kept in the custody of the Trust Company, and in the same boxes with the securities of the latter company (595, 599). The same was true of its stock and bond ledgers, transfer books and minute books (602, 605). The officers of the Belt Company and its subsidiaries were accustomed to take their orders from Stilwell or his confidential clerk, Cone, with regard to financial transactions (595, 604, 602, 605). Stilwell, as the president of the Trust Company, was the moving spirit (598). He would be asked which of the subsidiary companies he preferred should owe the Trust Company with respect to some particular transaction, and he would decide accordingly. Discharge from the service would be the penalty for disobedience (595). Stilwell always looked after the interests of the Trust Company first, before that of the railroad or that of any of the other companies (607).

When a meeting of Belt stockholders came on, the Trust Company would secure proxies from the non-resident shareholders so as to have a majority present at the meetings, and these proxies would usually run to Stilwell, and he, as such proxy, would vote the stock at these meetings.

Stilwell instructed his secretary, Cone, to keep writing to stockholders until he had a majority. The statements which were presented at these meetings were balance sheets, showing assets, liabilities, earnings and expenses, and the net result in surplus, but in those statements there would be no specifications showing the amount in detail, the amount of commissions or interest, or of other charges by the Trust Company; and in the statements sent out to financial publications or to stockholders these matters would not appear in detail in any of those statements (603, 604). Stilwell was a heavy stockholder in the Trust Company, as were his associates, Martin and Taylor, and they retained their holdings largely as permanent investments. They also owned stock from time to time in the Belt Company and other railroad companies promoted by the Trust Company, but these securities would be sold from time to time (600, 601).

The Belt Company never actively opposed any policy that was announced or established by the Trust Company. The Trust Company's officers would instruct as to what minutes should be placed on the minute books of the Belt Company and its subsidiaries (604). This was the case on one occasion in July, 1899, when the Trust Company's officers gave instructions that certain minutes should be placed on the minute books of the Belt Company, whereby a large number of shares of stock in various companies were turned over to the Trust Company as collateral security to the Trust Company's claim against the Belt Company (604). The vice-president of the Belt Company objected, in July, 1899, to turning over to the Trust Company a large amount of stocks and bonds of the Belt Company's subsidiaries, but he was overruled by the Trust Company's officers (605).

Whether the foregoing evidence, and much in addition which might be referred to, actually established the domination of the Trust Company over the Belt Company and its subsidiaries, as we think it did, is not important now. It is referred to for the purpose of showing that there was ample proof in the record that it was quite within the power of the Trust Company to control the other companies as it wished. We now proceed to point out that there was ample evidence tending to prove that such power was actually exercised by the Trust Company to the financial detriment of the Belt Company and its subsidiaries.

The DeGoeijen item.

One of the items in the Trust Company's account, and challenged in the accounting proceeding, is referred to in the evidence as the De Goeijen item of $89,333.33 (Rec. II, 682 *et seq.*). This was approximately 25 per cent. of the entire indebtedness claimed by the Trust Company, which amounted, at that time, to about $360,000.00 (Rec. II, 668). It appeared without contradiction that this item had been for a long time prior to March 31, 1899 (the day preceding the receivership of the Gulf Company) carried on the books of the Trust Company as an indebtedness of Mr. De Goeijen (whose solvency was then doubtful), and on that day (Rec. II, 688) it was arbitrarily, and without consideration, charged to the Belt Company, thus increasing its apparent indebtedness to the Trust Company in that amount. It was believed by the complainants at the time of the institution of this litigation, and there was obvious justification for the belief, that the Trust Company, on the eve of the receivership of the Gulf Company, had merely dumped this uncollectible debt back on the Belt Company; and accordingly,

in the accounting suit, this item of indebtedness was challenged.

Not only did the complainants feel justified in challenging this item, and in asking that it be eliminated from the account, but the Trust Company itself and its counsel deliberately and after full investigation reached the conclusion that the complainants were fully justified in their contention, and that the Trust Company had no right to charge this account back on the Belt Company. This is a matter of record, about which there can be no question or controversy. Mr. Mecartney became chief counsel for the Trust Company in 1904, and, in a written report upon this litigation made to the directors of that company, dated December 1, 1904 (Rec. I, 540), after stating the facts with respect to the De Goeijen item of $89,333.33, he said that the Belt Company should be credited with this amount. His language was: "This item must be allowed." This was the deliberate opinion of the chief counsel for the Trust Company four years after the institution of the action. Twenty-five per cent. of complainants' claim was, in his opinion, not even debatable; it was not to be litigated; it was to be conceded and allowed. Other counsel for the Trust Company (Rec. I, 512) had been of the same opinion.

We have, then, a claim in the accounting suit amounting to $89,333.33 which complainants' counsel felt was a just and meritorious claim. The Trust Company's counsel also felt that it was a just and meritorious claim, and so stated in writing to his principal. In the face of this fact, how can the court of appeals say that the whole litigation was vexatious? Where a complainant asserts, and the defendant concedes, that complainants' claim to the extent of 25 per cent. is just and meritorious, is it not a strange and unusual proceeding to characterize the action as a vexa-

tious suit, involving, as vexatious suits do, "malice and want of probable cause"? Is it malicious to sue a defendant for what it admits to be due? Is there not probable cause for a demand when defendant concedes it to be just?

True, the De Goeijen item was finally disallowed by the master (Rec. II, 692). It is interesting to follow the process by which this extraordinary result was brought about. The explanation is really very simple (Rec. I, 401). (This is from the testimony of Mr. Mecartney, at the time chief counsel for the Trust Company, given in his suit for fees against the Trust Company. His evidence was at first excluded by the master, but was afterwards admitted) (Rec. I, 678, 679). Mr. Frank B. Wilcox had formerly been auditor for the Trust Company. He was called by the complainants to testify in 1905. He was on the witness stand testifying for them when the Trust Company approached him to induce him to testify in its behalf, and, in particular, to give some explanation of the De Goeijen item which would relieve the Trust Company from the necessity of recrediting the amount to the Belt Company.

Mr. Wilcox told the junior counsel for the Trust Company (Rec. I, 401) that he was willing to give testimony which would completely overcome the complainants' claim with respect to this item, but he demanded compensation for his services. His terms were one-half of one per cent. of the amount to be saved the Trust Company, or a total of $446.66. This proposition was communicated by telephone to the chief counsel for the Trust Company, in or near Chicago, one Sunday morning. The latter replied over the telephone that he thought it would not look well to make a contract with a witness to testify on an exact percentage basis, but he directed his junior counsel to close the deal with Mr. Wilcox if the latter would accept $450.00

instead of $446.46. Naturally, Mr. Wilcox accepted, since he was to be paid $3.34 more than he had asked.

Mr. Wilcox afterwards testified in behalf of the Trust Company, in fulfillment of his percentage contract (augmented by a small bonus for the sake of appearances), to a secret understanding, not evidenced in any record, paper, document or memorandum (Rec. 11, 692), to the effect that while the Trust Company had in fact assumed and agreed to pay off the $89,333.33, this assumption was conditioned upon the payment being made to the Trust Company by Mr. De Goeijen as and when the latter should remit the money for that purpose. There was no testimony to the contrary, and the master accepted this explanation.

Whether the De Goeijen item was rightly disallowed is not, of course, the question here. The important fact is that the complainants in good faith believed that it should be allowed; and this good faith is made clear and unimpeachable by the fact that the Trust Company, no doubt with the natural reluctance to be expected under the circumstances, was compelled formally to concede and admit that the complainants' claim was well founded. This item, it will be remembered, represented 25 per cent. of the entire claim asserted by the complainants. In itself, it would fully justify the accounting proceeding. How can complainants' action challenging this item be characterized as vexatious?

The Stilwell contract.

In June, 1889, Stilwell, who was vice-president, general manager and member of the executive committee of the Trust Company, made a contract with the Suburban Company, the predecessor of the Belt Company, which, for

convenience, we will refer to as the Belt Company, by the terms of which he agreed to organize a company to construct a double track railroad for the Belt Company for a distance of some four and one-half miles in Kansas City, Missouri, including right of way, depots, etc. (Rec. II, 654). The contract price was to be $450,000.00 par value of bonds of the Belt Company and $900,000.00 par value of stock; both stock and bonds to be delivered to the Trust Company in escrow and finally delivered upon completion of the contract (Rec. II, 655). The contract itself was assigned to the Trust Company, which thereupon organized The Kansas City Construction Company, with a capital of $300,000.00, to do the work of construction (Rec. II, 657). The Construction Company entered upon its contract and, in May, 1890, had complied therewith in part only (Rec. II, 659), but had expended on construction the sum of $292,000.00, which was all the money that it had (Rec. II, 656, 662). Much yet remained to be done in acquiring right of way for tracks, lands for sidings and yard purposes, and certain depot work (Rec. II, 662).

As the Construction Company had no further funds, something had to be done. The Trust Company was in complete control of the entire situation and could do anything that it pleased. All the officers of the Construction Company were stockholders and directors of the Trust Company; and of the six directors of the Belt Company, five of them were either directors or officers, or both, of the Trust Company, and all were directors and stockholders of the Construction Company (Rec. II, 660).

Ordinary business integrity, as well as the interest of the Belt Company and its stockholders, demanded that the Construction Company comply with its construction contract. Obviously, the Construction Company was not en-

titled to the $450,000.00 of bonds and $900,000.00 of stock until this should be done. But the Trust Company found a way to get the full consideration for the complete performance of the contract, while leaving the contract itself unperformed. The Belt Company and the Construction Company, pursuant to authority granted at board meetings where the officers of the Trust Company were in complete control (Rec. II, 661), entered into a solemn contract whereby the Belt Company accepted the uncompleted railroad as a full compliance with the contract, and released the Construction Company from any further liability thereunder, and whereby the Trust Company was called upon to release to the Construction Company the $450,000.00 of bonds and $900,000.00 of stock deposited in escrow. The Construction Company willingly accepted this welcome relief from its financial difficulties, received the bonds and stock as specified in the contract, and distributed them to its stockholders, who, presumably, were officers, directors and stockholders of the Trust Company, since the master states that "the names of the incorporators and of the board of directors were largely persons interested in the Trust Company" (Rec. II, 657). At the time of this transaction, the stock of the Belt Company, amounting in the aggregate to 10,000 shares, was held as follows: Trust Company, 2,446; Trust Company, trustee for C. E. Grannis, 554; Trust Company, trustee, 4,000; E. L. Martin, trustee, 1,000; and one share each standing in the names of five directors (Rec. II, 661). It does not appear who the beneficial owners of the stock were, outside of 2,446 shares standing in the name of the Trust Company.

It necessarily followed that the cost of completing the railroad, which the Construction Company should have borne under its contract, had to be paid by the Belt Com-

pany. This ran into large figures, as set forth in Rec. II, 220-223, and amounted, in the aggregate, to a greater sum than the Trust Company's claim against the Belt Company.

In the ancillary bills it was claimed that this additional cost was foisted upon the Belt Company by the Trust Company through its domination over both the Belt Company and the Construction Company. The Trust Company, while not seriously controverting the facts, pleaded laches and the statute of limitations. The master, after having found against the theory of domination and control, sustained the plea.

These facts, which we have recited from the master's report, evidence, we contend, a ruthless exploitation of the resources of the Belt Company. No one can for a moment suppose that such a program of spoliation could have been put through without the Trust Company's corporate ascendancy over the other two companies. We are not now arguing that the master should have decided differently than he did, although that argument might well be forcefully made; but we do vigorously contend that the Belt Company and its receivers would have been unfaithful to the interests they represented if they had failed to challenge a transaction of this nature.

Will anyone for a moment contend that an action brought to compel restitution under these circumstances was trivial, insincere or vexatious? We feel certain that the court of appeals could not have understood the situation as it actually existed, and as it is disclosed in this voluminous record. Had it done so, it is inconceivable that it would have felt called upon to characterize the litigation as it did.

The litigation which occurred after the final decree of June, 1910.

The only party that appealed from this decree was the Trust Company; and substantially the only issue raised by it on its appeal, and subsequently by us on our appeal to this Court, was the question of the liability of petitioner for the debt of the Belt Company. The Central Improvement Company matter was incidental to this issue. If the petitioner was required to pay the Belt Company's debt, that automatically decided the Central Improvement Company matter. The liability issue, it will be remembered, was one that the Trust Company itself had injected into the case in 1905. If it had refrained from introducing this issue into the case, its appeal would have been limited to the less important item of the lands of the Central Improvement Company.

It seems to us unthinkable that the Trust Company's appeal, substantially for the purpose of determining the liability issue, or our subsequent appeal to this Court upon the same issue, can be characterized as vexatious on our part. Obviously, no one will be heard to urge that the petitioner should have confessed error in the proceeding in the court of appeals, or that it should have refrained from taking its appeal to this Court.

It should be wholly unnecessary, we respectfully submit, for us to be called upon to argue the good faith on our side of this litigation following the decree of the district court. But what are the facts?

(a) The district court in its final decree decided the liability issue in favor of petitioner, and also awarded it the Central Improvement Company lands. Its decree upon these two issues, in and of itself, effectively dispels and refutes

any imputation of bad faith or improper motives, even though the decree was afterwards reversed upon appeal. It is said in *Crescent City* v. *Butchers' Union,* 120 U. S. 141: * * * "the judgment or decree of a court having jurisdiction of the parties and of the subject matter, in favor of the plaintiff, is sufficient evidence of probable cause for its institution, although subsequently reversed by an appellate tribunal."

If the unthinkable intimation or suggestion should be made (nowhere has it been made) that the district court was actuated by improper motives in thus rendering its decree, and that these motives are to be imputed to petitioner, the case just cited gives the answer, in the following language (p. 159):

> "* * * It is equally true and equally well settled in the foundations of the law that neither misconduct nor demerit can be imputed to the court itself. It is an invincible presumption of the law that the judicial tribunal, acting within its jurisdiction, has acted impartially and honestly."

If there were nothing more, the decree of the district court in favor of petitioner is a complete and sufficient justification for all that it did following its entry in June, 1910. But there is much more.

(b) The court of appeals handed down its first opinion (201 Fed. 811) in October, 1912. There was no suggestion in it that the matters decided were trivial or lacking in substantial merit. On the contrary, that court, realizing the difficult nature of the issues involved, and being desirous of affording the fullest opportunity to test its conclusions, adopted the unusual procedure of permitting a reargument of the entire case, in January, 1913. After nearly

a year's deliberation, it handed down its second opinion. Here, again, as we shall presently show, there was no finding that the litigation was frivolous or vexatious. True, it said in its opinion that the averment that the Belt Company was not indebted to the Trust Company "has been *adjudged* untrue," and that "it has *become* clear that the Cambria Company has no cause of action against the Trust Company." But this is quite another matter, and is discussed later. The fact that the court of appeals permitted the reargument ought to be sufficient evidence that it regarded the issues as serious, important and difficult. It is not in the habit of granting rehearings where litigation appears on its face to be vexatious.

(c) Petitioner appealed from the court of appeals to this Court. The Trust Company filed a motion to dismiss. Petitioner countered with an application for certiorari.

This Court held, May 11, 1914, that the nature of the case was such that if it should appear that an appeal did not lie, the writ of certiorari would be granted, saying:

> The motion to dismiss is hence postponed to the hearing on the merits; and, *being of opinion that the nature of the case is such as to authorize the granting of the writ of certiorari which is applied for,* in the event it develops on the hearing there is no jurisdiction to review the same, the application for the writ of certiorari is therefore also postponed to the hearing.

It is unnecessary to point out that this Court, particularly at that time, issued its writs of certiorari very sparingly, and only in cases where grave questions were involved or where the public interest was directly affected. It did not issue its writ to review cases utterly lacking in merit, or of a vexatious character.

Finally, the case was heard and decided in this Court, and the decree of the court of appeals was affirmed. The Chief Justice and one of the Associate Justices dissented, as appears from the following statement (240 U. S. 166, 178):

> The Chief Justice and Mr. Justice Van Devanter are of opinion that, upon the finding of the master, the decree should be reversed, and therefore dissent.

Two Justices of this Court felt that the case of petitioner was a meritorious one. Surely, there is no necessity for petitioner to apologize for advocating a cause that received their support. To stigmatize such litigation as "vexatious" involves processes which we fail to understand.

The two injunction suits.

We desire to make a brief reference to the two injunction suits, reported in 146 Fed. 337 and 171 Fed. 43. In the opinion of the court of appeals (28 F. (2d) 240) they are referred to as "the two unwarranted injunction suits"; and it is added that "they furnish additional proof, if it were needed, of the vexatious character of the whole litigation."

We are prepared not only to argue, but to demonstrate, that the injunction suits were neither unwarranted nor are they additional proof, or proof in any degree, that the entire litigation, or any part of it, was vexatious.

(a) Both injunctions were duly granted by the district court of the United States for the western district of Missouri, in a case of which that court had jurisdiction, both of the subject matter and of the parties. The injunctions

were granted only after the Trust Company had been accorded a full hearing. One was granted by Honorable John F. Philips, then district judge for the western district of Missouri, and the other by Honorable Smith McPherson, then district judge for Iowa. In both cases it was the court, in the exercise of its judicial functions, after hearing in due and orderly course, that granted the injunctions. True, the injunctions were afterwards reversed by the court of appeals. But the action of the court in granting the injunctions, applying the rule of *Crescent City* v. *Butchers' Union*, 120 U. S. 14, "is sufficient evidence of probable cause for its institution, although subsequently reversed by an appellate tribunal." To characterize the injunctions as vexatious and unfounded is to impute misconduct and demerit to the court itself, in defiance of the "invincible presumption of the law that the judicial tribunal, acting within its jurisdiction, has acted impartially and honestly." This should be a complete answer to the court's criticism of the injunction suits; but there is another answer.

The principles of law for which petitioner contended unsuccessfully in the court of appeals in those two cases were, we respectfully submit, fully and completely adopted by it in 1921, in *Burke Construction Co.* v. *Kline*, 271 Fed. 605.

It is true that the *Burke* case was afterwards reversed by this court (260 U. S. 226), but that only serves to emphasize the difficult nature of the questions involved, and the unfairness of penalizing parties because their counsel may be unable to predict with absolute certainty what view an appellate court will take in so delicate a matter as the dividing line between federal and state jurisdiction.

The two injunction suits merely illustrate a situation which occurs in everyday practice of the law, when one party feels that his chances are best in a federal court, under the rules and decisions that obtain there, and the other party feels that his client will fare best in the state court, under its rules and decisions. Each one strives to have the case determined in the jurisdiction of his preference. Petitioner sought an adjudication in the federal court; and the Trust Company was striving just as hard to secure an adjudication of the cases it had brought in the state court. Each party was well within its rights in seeking the forum of its preference.

No court has found that any part of this litigation was baseless and unwarranted.

We challenge the statement contained in the opinion (28 F. (2d) 239): "This court characterized the Cambria Company suit as 'baseless' and 'unwarranted'."

We strenuously insist that the court of appeals in its first two opinions made no finding whatsoever reflecting upon the *bona fides* of the institution and prosecution of this action. In its first opinion (201 Fed. 811), the facts are stated at page 816, in plain language and without the use of unnecessary emphasis. It said:

> The master found that the evidence did not support the claim of the Cambria Company, and recommended that its bill be dismissed for want of equity. * * * The report of the special master was in all things approved and confirmed, and a decree entered in accordance with the findings and recommendations of the master.

Upon the reargument, counsel for petitioner endeavored with much earnestness in brief and argument to controvert

the conclusions of the court stated in the first opinion. Substantially the only issue dealt with was the liability issue. As the criticism by counsel of the first opinion of the court had been respectfully earnest and strenuous, so the second opinion of the court was emphatic and positive in support of the conclusion reached in its first opinion. The conclusions reached by the court in both opinions were substantially the same; the difference between them is largely in the emphatic language employed in the second opinion reinforcing its first conclusion. In the second opinion (210 Fed. 714), in reciting the facts to show that there was no evidence of laches on the part of the Trust Company, the court expanded the simple statement above quoted into the following:

> On September 6, 1900, the Cambria Company commenced the suit here in hand against the Belt Company and against the Trust Company to enjoin the latter from selling its collateral and applying their proceeds to the payment of the debt of the Belt Company, a suit which it founded on the averment, which has been *adjudged* untrue, that the Belt Company was not indebted to the Trust Company, and on other allegations so baseless that it has *become* clear that the Cambria Company had no cause of action against the Trust Company. (Italics ours.)

This, we respectfully submit, is no more than saying that in the decree in the lower court it was *adjudged* that the bill of the Cambria Company should be dismissed for want of equity. There is here no independent finding made by the court. There could not be, since the evidence was not brought to that court.

Again, the court says (p. 717):

> It (the Trust Company) gave notice of its sale of its remaining collaterals on September 1, 1900, and was enjoined from proceeding in the baseless suit of the Cambria Company.

Again, it is said (p. 718):

> By the Belt Company's consent to a judgment against it in favor of the Cambria Company, it laid the technical foundation of the Cambria Company's unwarranted suit, which prevented the Trust Company from selling its collaterals, and held the issue of the Belt Company's indebtedness to it suspended for more than eight years.

In both these quotations, the court of appeals is not making an independent finding of its own; it is merely reciting the *adjudication* in the district court, that the bill of the Cambria Company was without equity.

In the nature of things, it could not have made a finding that the Cambria Company suit was wholly baseless and unwarranted, except in the sense stated. The evidence in the case was not taken to that court. It said (201 Fed. 816): "The evidence has not been brought to this court." And it states (210 Fed. 723): "it would be unwise and might be unjust" to adjudicate any issue in the absence of the evidence.

Finally, it is entirely clear from the opinion itself that the court did not intend to characterize the suit as baseless and unwarranted. It had been expressly asked to do so, and it declined in plain and unambiguous language. Counsel for three stockholders of the Trust Company had petitioned the court "to adjudge" that "certain of the litigation" had been "commenced and prosecuted in bad faith," and the court was asked, thereupon, to give

appropriate directions in the decree touching the taxation by the district court of the Trust Company's disbursements (210 Fed. 722); but the court declined to entertain the petition. It declined "to adjudicate" as requested. It said (p. 723): "It would be unwise and might be unjust to adjudicate the questions presented by the petition of these stockholders." Three reasons were given: (1) The question came into the suit for the first time at the rehearing; (2) no evidence had been taken relative to it; and (3) the evidence upon the issues of the case had not been brought to that court.

Does not this conclusively prove that the court of appeals did not in fact pass upon or adjudicate any question touching the good faith of the institution and prosecution of the action? Is it not entirely clear that the court declined even to express any opinion upon the question, for the three reasons stated? The reasons themselves exclude the possibility of an adjudication, or an opinion or a characterization. How, therefore, can it now be plausibly claimed that the court of appeals decided that the suit was baseless and unwarranted, or even characterized it as such? We respectfully submit that the court of appeals in its third opinion has completely misconceived the scope and effect of its second opinion, and that its criticism is entirely unjustified.

The opinion of this Court is controlling, and it contains no intimation that the litigation was vexatious.

In the opinion delivered by this Court, the history of the litigation is stated, the relations of the parties are defined, and the entire matter is reviewed, as it was in the court of appeals, and the decree of the latter was affirmed. What was the decree of that court which was affirmed?

It is found in the concluding paragraph of its opinion (210 Fed. 723, 724), where the district court is directed to enter a specific decree, the details of which are stated at length. Petitioner is required to pay the debt of the Belt Company "and the costs of this suit." If it fails to do so, then certain property may be sold in order to pay "the debt and the costs" out of the proceeds of the sale. The proceeds of such sale shall be applied in the payment of the debt "and of the costs after as well as before the decree." "The decree should adjudge that the Trust Company may recover its costs down to the entry of the decree of the Cambria Company as well as of the Southern Company, and the court may opportion those costs between them, but not as against the Trust Company, which should be permitted to pursue either or both of them until its costs are paid."

This is the decree which this Court affirmed, for reasons stated in its opinion. Nothing is said by this Court or in the proposed form of decree which warrants an imputation of bad faith. The decree, we contend, carries ordinary costs as between party and party, and no more. If this Court had intended that costs should be taxed in accordance with rules obtaining in some foreign jurisdiction, or in some unusual and unprecedented manner, it would have said so in plain and direct language. If it had thought that the litigation was trivial or vexatious, and that the parties should be penalized on that account, we may be sure that we would not be left to conjecture as to its intention. Where this Court finds that either parties or counsel have overstepped the bounds of propriety, and for that reason need to be rebuked, it is its custom and practice to say so in direct and unambiguous language.

Petitioner respectfully prays that the judgment and decree of the circuit court of appeals be reversed, and that the decree of the district court be affirmed; and that the lower court's characterization of this litigation as vexatious be disapproved.

October 4, 1929.

Respectfully submitted,

FRANK H. MOORE,
CYRUS CRANE,
A. F. SMITH,
Attorneys for Petitioner.

SAMUEL W. MOORE,
Of Counsel.

PETITIONER'S REPLY BRIEF

FILE COPY

Office Supreme Court
FILED
OCT 24 19
CHARLES ELMORE
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 22.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,

Petitioner,

v.

GUARDIAN TRUST COMPANY,
Henry C. Flower, Receiver.

Respondent.

REPLY BRIEF OF PETITIONER.

FRANK H. MOORE,
CYRUS CRANE,
A. F. SMITH,
Attorneys for Petitioner.

SAMUEL W. MOORE,
Of Counsel.

October 24, 1929.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

INDEX.

	PAGE
Counsel is completely mistaken in his assertion that the Court of Appeals found that the Cambria suit was vexatious	2
Counsel's claim that a plan was formed to harass and annoy the Trust Company by means of this litigation, is purely imaginary	5
Complaints of charges of fraud come with poor grace from the Trust Company	17
The Trust Company, as pledgee of the collateral security, performed no services for the benefit of the Belt Company, as pledgor	21
The proper execution of the mandate of this Court	23

AUTHORITIES CITED.

Daniell's (Second) Chancery Practice, Fifth Ed., p. 1411	23
Guardian Trust Company *v.* Kansas City Southern Ry. Co., 201 Fed. 811	2
210 Fed. 722, 723	3
171 Fed. 43, 50	11
Trimble *v.* Guardian Trust Co., 244 Mo. 228, 263	9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 22.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

GUARDIAN TRUST COMPANY, Henry C. Flower, Receiver,
Respondent,

REPLY BRIEF OF PETITIONER.

The main purpose of this reply brief is to point out some of the errors in the statement of facts contained in respondent's brief. While it seems improbable that these matters will enter into the decision of the case, yet we are reluctant to allow misstatements of fact, which conceivably may prejudice the case, to pass by unchallenged.

It will be noted that, throughout respondent's brief, there are numerous statements which purport to be statements of fact taken from the record, but which are without any supporting references to the record, and for which the record itself, we contend, affords no justification. In so far as these statements are outside of the record, their accuracy is by no means admitted.

Counsel is completely mistaken in his assertion that the court of appeals found that the Cambria suit was vexatious.

At the very outset of respondent's brief (p. 2), the erroneous and misleading statement is made that the circuit court of appeals, upon a former appeal, found that the Cambria suit was the suit of the Southern Company and "that it was a baseless and unwarranted action, filed for the ulterior purpose of wrongfully depriving the Trust Company of the collateral pledged to it as security for the debt of the Belt Company." This is repeated frequently throughout the brief.

It is entirely plain, we respectfully submit, that no such finding was made by the court of appeals. The record itself clearly so states, in plain and unambiguous language, as we now proceed to point out.

The first time that any claim was asserted by any one that this litigation was vexatious and that for that reason the ordinary rule of costs as between party and party should be departed from, was made after the first decision of the court of appeals in favor of the Trust Company (201 Fed. 811), and over twelve years after the suit was instituted. The Chicago counsel for three stockholders of the Trust Company filed a petition in the court of appeals in December, 1912 (Rec. II, 1006), asking that court "to embody in its decree of reversal a special finding that the entire litigation has been trivial, wanton and oppressive"; and further asking the court, upon making this special finding, thereupon either to direct the lower court to ascertain and decree the payment by petitioner of the Trust Company's disbursements in the litigation, consisting of attorneys' fees, solicitors' fees, stenographers' fees, etc.; or, in

the alternative, to incorporate in the decree a provision permitting the Trust Company to institute thereafter an independent action or actions against petitioner to recover such disbursements. The primary purpose of this petition, as clearly appears on its face, was to secure from the court of appeals a "special finding" that the litigation was vexatious.

This Court might naturally infer from the statement in the brief, above quoted, that this petition filed by the counsel for the three stockholders had been granted by the court of appeals, and that the "special finding" had been made as requested. But the facts are precisely to the contrary. The court of appeals specifically declined to make the special finding requested by counsel for the three stockholders, or any finding, special or otherwise, upon the subject. It declined to entertain the petition, or to pass upon it one way or the other. That this was the court's action is so clear as to be beyond the realm of controversy (210 Fed. 723). This was the only occasion on which the question arose in the court of appeals.

The court of appeals gave three unanswerable reasons for its action (210 Fed. 722, 723): *first,* that the petition came too late, being presented for the first time after the first decision of the court, and shortly prior to the reargument in 1913; *secondly,* that there was no evidence before the court bearing upon the issue of good faith, and, obviously, it could not pass upon that issue in the absence of evidence; and, *thirdly,* the evidence upon the main issues in the case had not been brought to the appellate court, and, manifestly, the court could not determine the character of the litigation in the absence of the evidence upon the merits of the case. The court very properly said that "it

would be unwise and might be unjust" to adjudicate the issues tendered by the petition of counsel for the three stockholders under those circumstances; and, very naturally, it declined to do so. It is in the face of this record that respondent now contends that the requested special finding, which the court refused to make, was actually made.

But the court of appeals did not stop there. It felt that there should be an end of the litigation, which was then thirteen years old. Not only did it decline itself to adjudicate the issue of the good faith of the litigation raised at that late day and without any evidence upon which it could act, but it did not propose to allow the district court to further prolong the litigation by undertaking itself to hear and adjudicate those same issues; and so, in substance, it directed the lower court to refrain from reopening the case for that purpose. This is aptly expressed in the following language (210 Fed. 723):

> . . . as directions to the court below to open and try new issues might, and probably would, prolong this litigation through several years more, our conclusion is that our just course is to leave the taxation of costs to the court below under the principles, rules, and practice in equity.

We respectfully and confidently contend that no one can read the record referred to above without being promptly convinced that the court of appeals did not, as contended by counsel, find that the litigation was baseless and unwarranted. It said itself, in so many words, that it declined to make a finding of that nature, or any finding whatsoever on the subject. The use of the words "baseless and unwarranted," occurring in other parts of the opinion, can

only refer, as we pointed out in our main brief (pp. 82-85), to the fact that the Cambria bill had been *adjudged* to be without equity. The brief statement in the third opinion to the effect that the court of appeals had previously characterized the Cambria Company's suit as baseless and unwarranted, can only be explained upon the assumption that the court in making that statement had been misled by a superficial examination of the opinion.

The further statement contained in the excerpt from respondent's brief, above quoted, to the effect that the court of appeals had actually found that the Cambria suit was filed "for the ulterior purpose of wrongfully depriving the Trust Company of the collateral pledged to it as security for the debt of the Belt Company," is too obviously due to counsel's zeal to require serious consideration. It can not be pretended that there is anything in the record which lends color to the statement.

Counsel's claim that a plan was formed to harass and annoy the Trust Company by means of this litigation, is purely imaginary.

In respondent's brief, it is intimated that this suit and various other proceedings were part of a general plan to harass and annoy the Trust Company. We confidently contend that the record contains not the slightest support or justification for this unwarranted charge.

1. It is suggested (p. 11) that the appointment of a receiver for the Guardian Trust Company in 1900 was based, to some extent at least, upon the "huge claims" made against it in the Cambria bill. This is erroneous, as the record clearly indicates. The opinion of Judge Thayer, then circuit judge for the eighth circuit, appoint-

ing a receiver for the Trust Company in the Bierce case, in November, 1900, will be found in the record (Rec. I, 437). It is there stated that the bill of complaint was one by minority stockholders of the Trust Company to "correct abuses of administration and to obtain the appointment of a receiver because of the mismanagement of the company's officers and various *ultra vires* acts committed by the directors and managers," leading to a dissipation of the company's assets.

It is interesting to note that these charges of mismanagement and *ultra vires* acts, brought by stockholders against the Trust Company in the Bierce case in 1900, have a direct bearing upon the charges of domination and control and maladministration brought against the Trust Company in this case.

Judge Thayer summarized the proof (Rec. I, 439), which, he said, established with reasonable certainty that the Trust Company had made a practice of organizing other corporations to engage in various enterprises of a highly speculative character; that its funds had been invested in the stocks and bonds of such concerns and losses occasioned thereby, and further losses were imminent; that the officers, directors and employees of the Trust Company generally served as officers and directors of such subsidiary companies, and that such subsidiary companies were mere adjuncts of the Trust Company, and that such outside enterprises were its own adventures. Judge Thayer was referring, in large part at least, to the very activities of the Trust Company complained of in this action and made the basis for the accounting proceedings. He said (Rec. I, 439):

> The proof shows with reasonable certainty that the officers and directors of the defendant company

> have made a practice of organizing other corporations to engage in various enterprises of a highly speculative character; that funds of the company to a large amount have been invested in the stocks and bonds of such concerns which had at the time no market value; that money in considerable sums has been loaned to such companies, sometimes upon their stock as collateral, and on other occasions without any security; that some of these enterprises have proved absolute failures; and that the money invested therein has been wholly lost, while other of such enterprises are in a precarious condition and the outcome thereof is doubtful and uncertain. The fact that officers, directors and employees of the trust company have generally served as officers and directors of such subsidiary companies and have held stock therein, leads the court to conclude that the moneys of the trust company would not have been used to purchase the stocks and bonds of such concerns and to supply them with capital, except on the theory that they were mere adjuncts of the trust company and that the enterprises which it thus attempted to foster by the means aforesaid were its own adventures.

Judge Thayer furthermore said, as the complainants have said in this case, that there was such an identity of officers and employees governing these corporations that it was impossible to believe that their interests were properly protected in dealings between them. He said (Rec. I, 439):

> Moreover, in some cases, if not in all, there appears to have been such identity in the personnel of the governing bodies of these corporations and the governing body of the trust company that it is impossible to believe that the interests of either were

fairly considered or properly guarded in any of the transactions and dealings which occurred between them.

The appointment of a reciver for the Trust Company in 1900 was far from being any evidence of a conspiracy on the part of any one to harass and annoy it. It affords very persuasive evidence of the Trust Company's domination and control over the Belt Company and its subsidiaries through the interlocking and intermingling of officers and directors, with resulting unfair bargains made by officials dealing with themselves; and of the propriety, and even necessity, of an accounting to determine the real rights and obligations of the parties.

2. Again, respondent refers to the four separate bills for the foreclosure of the mortgages of the Belt line and its subsidiaries, as well as to the foreclosure of the Kansas City, Pittsburg & Gulf and Port Arthur Channel & Dock mortgages and the reorganization plan as part of a general conspiracy against the Trust Company. With respect to the mortgage foreclosures and the reorganization plan (under which the Trust Company was one of the depositaries), the master made an explicit finding (Rec. II, 853), quoted *infra*, holding that there was no evidence whatsoever of actual fraud in any of these proceedings.

The receivership of the Kansas City, Pittsburg & Gulf Company, so far from being any evidence of conspiracy on the part of the complainants, discloses the Trust Company as the aggressor rather than the injured and innocent party. It will be remembered that on March 31, 1899, the Trust Company took or received from the Belt Company the notes and collateral security in controversy. It then knew that on the following day the Gulf Company would default

in the payment of interest then due. Not content with thus stripping the Belt Company of all its available assets on the eve of the receivership, the Trust Company itself precipitated the receivership on April 1, 1899. Its counsel on that day brought a suit in the name of the Belt Company and certain persons interested in the Trust Company, as well as the Gulf Company, against the Gulf Company in the state court at Kansas City, Missouri, setting up the insolvency of the Gulf Company and its exposure to the demands of various creditors, and asking for the appointment of a receiver (Rec. I, 430-436). Midnight receivers were appointed, their personnel consisting of three individuals, two of whom were officers of the Trust Company. It was "a race of diligence for the control of the litigation through receivership" (*Trimble* vs. *Trust Co.*, 244 Mo. 228, 263). Counsel for the Trust Company, who was also counsel for the Gulf Company and for the Belt Company, testified (244 Mo. 244) "I had suit instituted here (Kansas City) to put the Kansas City, Pittsburg & Gulf Railway Company in the hands of a receiver before the New York Committee could get out here and do it. * * * This action was taken on behalf of the Trust Company." The Trust Company itself brought suit in Louisiana, and also in Texas, and had receivers appointed there.

Not only was the Trust Company extremely vigilant in bringing its own suit first, and in securing the appointment of its own receivers in the case of the Gulf Company, but it contemplated taking action to secure the same priority in the appointment of receivers for the Belt Company. Prior to the filing of the Cambria bill, in September, 1900, the Trust Company was taking steps, in its own behalf, to secure the appointment of a receiver for the Belt Company

upon a creditor's bill. The Cambria bill merely anticipated the Trust Company's move. Again, it appears to have been a race of diligence. This is apparent from the offer of proof (Rec. I, 36). As respondent has referred to this offer of proof, and quoted from it in its brief, p. 100, we feel at liberty to do the same. The following appears immediately preceding the excerpt quoted by respondent:

> About the middle of August, 1900, the Belt Company and your petitioner were reliably advised that the Trust Company had itself conceived the idea of procuring the appointment of a receiver for the Belt Company, and that it was then endeavoring to persuade one of the creditors of the Belt Company to institute such an action.

It was only the failure of the Trust Company to get into court first and initiate its own litigation and secure its own receiver for the Belt Company, as it did for the Gulf Company, that enables it now to cry conspiracy against its adversary.

3. Counsel, at page 114, finds additional evidence of wrongdoing on the part of complainants in the fact that they did not appeal from the decree of the district court upon the issue of debt or no debt as between the Belt Company and the Trust Company. The reason why no such appeal was taken clearly appears in the record, and it requires a strong imagination to draw any prejudicial inference therefrom.

When the Trust Company appealed from the decree of June, 1910, which adjudicated that the petitioner was not liable for the debt of the Belt Company, it carefully refrained from assigning as error the soundness of that

adjudication (Rec. II, 916). Its only assignment was that the court erred in "including in said decree" the finding of non-liability. It then had its own suits pending in the state court at Kansas City against the petitioner upon precisely the same cause of action (Rec. II, 502-545). The Trust Company preferred to try the liability issue in the state court. It apparently felt encouraged by the statement contained in the opinion of the court of appeals (171 Fed. 43, 50), to the effect that the liability of petitioner to pay the debts of the Belt Company was not at issue and could not be litigated in the action in the federal court (Rec. II, 894). Accordingly, in taking its appeal, it sought to eliminate the liability issue from the case rather than incur the hazard of an affirmance of the district court's decree.

Petitioner felt confident that the liability issue, which the district court had decided in its favor, was properly in the case, and that the appellate court would so hold, as it did subsequently. If this view were correct, it would follow that the district court's finding of non-liability would be affirmed; and in that event the state of account between the Belt Company and the Trust Company, or the amount of the judgment in favor of the latter, would not be a matter of practical importance. Petitioner's reason for not appealing is stated in an affidavit filed in the court of appeals (Rec. II, 1024). The case was first argued and submitted in the court of appeals in May, 1911 (Rec. II, 948). The contention of the Trust Company there was that the liability issue was not properly in the case, in accordance with its assignment of error to that effect. Sometime after the final submission of the case, the court announced to counsel (Rec. II, 978) that it had reached the tentative

conclusion that that issue was necessarily involved in the case. Thereupon counsel for three stockholders of the Trust Company were permitted to intervene (Rec. II, 971, 985), and, for the first time, to challenge the correctness of that part of the district court's decree holding that petitioner was liable for the debt of the Belt Company. When this took place the time limited by statute within which the complainants could take an appeal on the issue of debt or no debt, had long since passed. Petitioner urged these facts unsuccessfully in this Court, as well as in the court of appeals, as a reason why the Trust Company should be confined to its assignment of error as originally made. Manifestly, the petitioner was placed in an unfortunate position; but its misadventure ought not to be tortured into evidence of a conspiracy to injure and oppress the Trust Company, as its counsel seeks to do.

4. Incredible as it may seem, the Trust Company in its brief (p. 98), after referring to the amount claimed by the Trust Company as being due from the Belt Company, put at approximately $400,000, says: "There is not, and never was, the slightest doubt as to the genuineness of that indebtedness." And it makes the amazing statement (p. 117), evidently based thereon, that the purpose of the litigation, on the part of the complainant, "was to smother the Trust Company with difficulties and expenses until it could no longer sustain the unequal contest".

After the Trust Company had consented to an accounting by answer and by stipulation, as was pointed out in our main brief, the only purpose of which was to challenge the correctness of this debt, and after the master, upon the coming in of the Trust Company's account, and upon a consideration of the evidence submitted by complainant,

had ruled that there must be an accounting, the whole purpose of which was to determine the question of debt or no debt; after the court had overruled a motion in the nature of a demurrer for want of equity (Rec. II, 565, 567), and after the Trust Company in view of the evidence adduced was compelled to confess two items of the account, and after the master upon the evidence determined a third one adversely to the Trust Company, and after the Trust Company had escaped from serious consequences by successfully pleading the statute of limitations, we are now solemnly told by counsel that there never was any question about the genuineness of the indebtedness, fixed at the sum named; and, based upon that figment of the imagination, the Court is informed that the purpose of this litigation was to smother the Trust Company with expenses until it should succumb in the unequal struggle.

Instead of assuming this extraordinary attitude, the Trust Company might well appreciate that it had been liberally favored by fortune in receiving payment in full of its judgment against the Belt Company. We have no desire to reargue those issues, but in view of counsel's statement above quoted, it may assist the Court if we point out a few pertinent facts and circumstances, in addition to those contained in our original brief.

The gravamen of the action, as above stated, was the charge that the Trust Company dominated and controlled the other companies to their disadvantage. The extract from Judge Thayer's opinion, above quoted, presents the situation with a considerable decree of accuracy. The master had already found in this case that there was a domination and control exercised by the Trust Company, but on final analysis he held that it was not sufficient in amount

or extent to come within the rule as he understood it. He said (Rec. II, 643, 644):

> The Trust Company was the central and important and controlling corporation of the aggregation, known as the Stilwell companies, and which, in large measure, was influential in bringing into existence all the corporations, whose operations are involved in complainants' bill, and which were substantially financed by it.
>
> If there was any dominating control exercised in the controverted transactions between the Trust Company and any of these other companies, by reason of the mutuality of the officers and directors representing the companies, so dealing with each other, it is evident from the proofs in the record, that such domination must have been on the part of the Trust Company, and not on the part of the subordinate companies.
>
> From the foregoing statements of the witnesses, Cone and others, it cannot be questioned that A. E. Stilwell was the influential and dominant personage, who, more than any other person connected with it, outlined the policies of the Trust Company, and likewise, with E. L. Martin, and other associates, *practically determined those of the railroad companies interested in this accounting.*

Can anyone doubt that with this finding as a basis, the master might well have concluded that the unreasonable and excessive charges of the Trust Company against the Belt Company and its subsidiaries should be eliminated from the accounts, or reduced to fair and equitable amounts? Had he done so, it is too plain for argument that his finding would have been supported by substantial evidence, and hence unassailable.

The master pointed out (Rec. II, 644) that the Trust Company "may have received, and did, in fact, receive large compensation for its services, in the way of commissions, trustee fees and bonuses".

Again he said (Rec. II, 645):

> . . . it is evident from the testimony of E. L. Martin and others, that there was at all times manifested a friendly disposition to deal "liberally" with the Trust Company.

In respect of the charge that the Trust Company had taken $350,000 of Union Terminal bonds, issued for the purpose of building the railroad of that company, and had used those bonds to apply on the indebtedness of the Belt Company in the construction of another road (Rec. II, 887), the master intimated that "the respondent might be held liable therefor to other parties".

On the charge of extravagance in the cost of construction and the issuance of bonds, the master said (Rec. II, 852):

> It may be properly suggested that there has been produced in this cause considerable testimony tending to show that all the roads forming the Belt System were extravagantly built, and were bonded largely in excess of their actual cost.

As to the charge of excessive trustees' fees, commissions, bonuses, etc., he said (Rec. II, 705):

> There may rightly be a difference of opinion as to whether such charges were reasonable at all times.

As to the charges made by the building department, the master said (Rec. II, 708):

> It is possible that some of the charges for the work done may have been higher than it was necessary to pay for the same work on the outside.

The Belt Company in 1896 entered into a contract, set out in the record (Rec. II, 69), for the construction of another railroad, called the Kansas City & Northern Connecting Railroad. Its duties under this contract were those of a general railroad construction contractor. Complainants contended in this case that the Trust Company, through its control over the Belt Company, wrongfully caused it to enter into this construction contract. The result of the contract was a large loss, which the Belt Company was compelled to bear. It appears from the master's report (Rec. II, 669) that a large part of the $360,000 owing by the Belt Company to the Trust Company on March 31, 1899, was made up of this deficit. It was contended by complainants that this construction contract was *ultra vires* and beyond the corporate capacity of the Belt Company. To say the least, this was a debatable question, and the finding might well have been against the Trust Company.

With respect to the Stilwell contract, respondent's counsel does not deny that the Belt Company sustained an enormous loss because it accepted an uncompleted railroad in satisfaction of a contract for a completed road, the Trust Company being in complete control of both companies and it and its friends being the beneficiaries of the transaction. He is content, however, to point to the statute of limitations and to characterize the assertion of this claim by complainants as an effort to smother the Trust Company with expenses until it should become exhausted. But was the statute of limitations a bar to a recovery in this case? We thought not, for the reason that neither the statute of limi-

tations nor the doctrine of laches should be applicable during a period when the Belt Company was under the domination of officers of the Trust Company, and while it was caused to act in the interest of the latter. This, of course, is not now a live question, since it has been foreclosed by the decree. But it must be admitted that it was a real question in the case. The evidence, as we have heretofore stated, clearly warranted a finding that such domination and control actually existed, and that, therefore, the claim was not barred.

Equally unsatisfactory is respondent's answer to the De Goeijen claim. True, the master, after holding that Wilcox's testimony disposed of the item in favor of the Trust Company, also held that it was embraced within the general terms of the settlement between the reorganization committee and De Goeijen. But this was a disputed issue. Petitioner did not think it was included within the very general language of the document, and evidently counsel for the Trust Company agreed with that contention in 1904, when, after a thorough investigation, his conclusion was (Rec. I, 563, 564): "This item must be allowed." This, it may be added, was also the view entertained by prior counsel for the Trust Company, as well as by Mr. Mecartney and his associate (Rec. I, 512).

Complaints of charges of fraud come with poor grace from the Trust Company.

We have pointed out in our main brief (p. 11) that the master did not regard the complainants' action as one involving charges of actual fraud, and also that the Trust Company itself, when the matter was fresh in its mind, put itself on record, in a statement verified by one of its

counsel, that no charges of actual fraud had been made. To this may be added the statement of counsel for the three stockholders (Rec. II, 961), "that the entire charge of 'domination' and resultant fraud and unfairness is based solely upon the averment (as to community of directors); that therefore and thereby the entire transactions between the two companies . . . were constructively 'fraudulent'." Their characterization of the intervening petition (Rec. II, 957) is equally free from charges of fraud. Nevertheless, the brief of respondent now complains that it was charged with fraud, and intimates that such charges are evidence of a desire to oppress and injure it.

It will be noted, however, that the Trust Company, at the very inception of this litigation, itself set the example of making wholesale charges of fraud and fraudulent conduct against its adversaries; charges which were not subsequently sustained. In its answer to the Cambria bill, filed in November, 1900 (Rec. II, 33) the Trust Company, while admitting the justice of the Cambria's claim, nevertheless insisted (Rec. II, 35) that the suit was not instituted in good faith, but, on the contrary, that the Belt Company, the Philadelphia reorganization committee and the petitioner were acting collusively for the fraudulent purpose and design of hindering and delaying and defrauding the creditors of the Belt Company.

It was also alleged that the four actions for the foreclosure of mortgages on the properties of the Belt Company and its subsidiaries were based upon the false and fraudulent pretense that there had been a default in the payment of interest, and for the fraudulent purpose, design and intent by said parties to cut off and defeat unsecured creditors, and not for the purpose of enforcing payment of the

mortgage bonds (Rec. II, 36, 37); and that the action of the Provident Life & Trust Company of Philadelphia in instituting the foreclosure suits was fraudulent and for the purpose of hindering and delaying unsecured creditors of the Belt Company. It was charged that the Philadelphia committee, the Belt Company and the petitioner "wrongfully and wickedly" conceived the plan of escaping the payment of the unsecured debts of the Belt Company by means of said foreclosure suits, and the Cambria suit simultaneously instituted (Rec. II, 41). These allegations are repeated throughout the answer (Rec. II, 43, 44, 45); again, in the answer of the Central Improvement Company, represented by the same counsel (Rec. II, 77, 78, 79, 83); and again in the Trust Company's answer to the ancillary bill (Rec. II, 115, 116). The Trust Company made the same allegations of fraud in the Bierce case (Rec. I, 447), and in the Provident Life & Trust Company foreclosure suit against the Belt Company (Rec. I, 599).

The Trust Company even went so far as to allege that an answer not then in existence, but which it was supposed the Belt Company might or would file at some time in the future, would be, if filed, collusive and fraudulent, for the purpose of defrauding its own creditors. In that respect, after noting the failure of the Belt Company to file an answer, it said (Rec. II, 116):

> If it should file any such answer, the same will be collusive and fraudulent, for the purpose of carrying out the purposes of said suit in hindering, delaying and defrauding the creditors of the said Kansas City Suburban Belt Railroad Company.

However, this anticipatory allegation of fraud was stricken out by the court (Rec. II, 161).

Manifestly, the Trust Company went to the extreme limit in charging actual, purposeful and intentional fraud on the part of all its adversaries. Its charges were couched in vigorous and emphatic language, and included the Provident Life & Trust Company, the complainant in the four foreclosure suits, the Cambria Company, the Philadelphia committee, the Belt Company and petitioner.

It also charged that the reorganization plan and agreement were fraudulent (Rec. II, 866). The master devotes four pages of his report to a discussion of these charges of fraud (Rec. II, 866-870) holding that they were unfounded. They were made, as he points out, notwithstanding the fact that the Trust Company was a depositary under the reorganization plan, and that it cooperated with the reorganization committee and used its influence, by correspondence and otherwise, to induce bondholders and stockholders to deposit their securities with the committee; and that it deposited its own stocks and bonds in a substantial amount, and in that way benefited from the plan (Rec. II, 870).

But the Trust Company's charges of fraud were not sustained. The master made specific findings as follows (Rec. II, 852, 853, 854):

> The foreclosure sales were legally made, and the Trust Company, though a party to the foreclosure proceedings, has not at any time objected to the regularity thereof, or the sufficiency of the amounts received for the properties sold.
>
> There is no evidence in the record showing actual frauds either at or in the inception of the reorganization scheme, or in any proceeding thereunder; including the foreclosures of the mortgage liens on the properties sold and the conveyance to the Southern Company.

These findings of the master were approved by the district court; and while the master's conclusion upon the liability issue has been overturned, his finding with respect to the absence of actual fraud was not criticized or modified.

It thus appears that petitioner and those associated with it in the litigation were subjected to repeated and reiterated charges of actual and intentional fraud, and that these charges were not sustained. If the respondent's contention with respect to the taxation of costs between solicitor and client is correct, petitioner would be entitled to charge against the respondent its disbursements for attorneys' fees and other expenses incurred in this litigation. It is unnecessary, perhaps, to say that petitioner does not feel that, under the law as it exists in this country, it has any excuse or justification for putting forward a claim of that character.

The Trust Company, as pledgee of the collateral security, performed no services for the benefit of the Belt Company, as pledgor.

Respondent contends in its brief (p. 38 *et seq.*) that the Trust Company, as a pledgee, was engaged in defending the title of the Belt Company as pledgor, and that it is entitled to be compensated therefor through an allowance of counsel fees and other expenses. It needs but a brief consideration of the record to discover that there are no facts upon which such a claim can properly rest.

As we have pointed out in our main brief (p. 21), substantially all the collateral which the Trust Company received from the Belt Company had, with the exception of the Central Improvement Company stock, been sold, either prior to the inception of the litigation or very shortly thereafter, and

the proceeds applied by the Trust Company upon the indebtedness in question. In these instances, therefore, after such sales were made, there was no pledged collateral whose title needed defending. The proceeds of the sale of the collateral remained as a bookkeeping credit, to be applied in the reduction of the Trust Company's account or otherwise, as the rights of the parties might appear on final hearing. The Central Improvement lands were in the hands of its own receiver, who at all times was a party to this action, and were being administered by him, who presumably gave them all the protection needed. The stock was of no value, aside from the lands. There was, therefore, no pledged property for the Trust Company to protect. There was no property whose title had to be defended by it in the interest of a pledgor.

But if the collateral security had remained intact in the hands of the Trust Company throughout the litigation, as it did not, the Trust Company could not claim that it was defending the title of the Belt Company, as pledgor, within the rule which gives the pledgee an allowance for so doing, for the simple reason that the Trust Company was not acting for the benefit of the pledgor, as a quasi or emergency agent; but, on the contrary, it was acting solely in its own interest, to serve its own individual purposes. It is not intended to criticize the Trust Company for so doing, but, undoubtedly, it had no thought of benefiting the Belt Company, or of benefiting anybody except itself. The attitude of the Belt Company in the litigation was that the Trust Company had wrongfully acquired the collateral to secure an indebtedness that had no existence, and that, therefore, it or its proceeds should be returned; and this the Trust Company denied. The attitude of petitioner was that the collateral or its proceeds had passed to it with the

foreclosure of the old companies; and this the Trust Company denied. It was an ordinary, everyday litigation, where each party strives to the best of its ability to protect its own interest. It is little less than absurd to suppose that, under these circumstances, the Trust Company was acting for the benefit of the Belt Company, as a quasi or emergency agent, to protect its interest.

The proper execution of the mandate of this Court.

To the authorities cited in our main brief (p. 24 *et seq.*), we desire to add the following statement from *Second Daniell's Chancery Practice, Fifth Edition, page 1411:*

> When costs are ordered to be taxed simply, it means as between party and party. If the costs are to be taxed as between solicitor and client, or if any costs, charges, and expenses, not strictly costs of suit, are to be allowed on the taxation, or any variation from a taxation as between party and party, is to be allowed, it should be expressed in the decree.

October 24, 1929.

Respectfully submitted,

FRANK H. MOORE,
CYRUS CRANE,
A. F. SMITH,
Attorneys for Petitioner.

SAMUEL W. MOORE,
Of Counsel.

RESPONDENT'S BRIEF

FILE COPY

Office Supreme Court
FILED
OCT 21 19
CHARLES ELMORE
CL

No. 22.

In the Supreme Court of the United States

October Term, 1929.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,

vs.

GUARDIAN TRUST COMPANY, *Respondent.*

STATEMENT AND BRIEF FOR RESPONDENT.

JUSTIN D. BOWERSOCK,
ROBERT B. FIZZELL,
JOHN F. RHODES,
Attorneys for Respondent.

SMITH-GREVER, LAW PRINTERS KANSAS CITY, MO

INDEX

	PAGE
Statement	1-33
Organization of companies	3
Reorganization of Gulf Company	5
Belt Company indebtedness to Trust Company	6
Belt foreclosure suit	6
Filing of Cambria bill	8
Trust Company's answer to Cambria bill	11
Ancillary bill by Belt receivers	12
Intervening petition of Southern Company	12
Trust Company's answer to intervening petition	13
Amended and supplemental ancillary bill of Belt receivers	13
Amended intervening petition of Southern Company	14
Supplemental bill of Southern and Belt receivers	15
Injunctions against state court suits	17
Reference to Master	17
Findings of Master	19
Exceptions to Master's report	22
Appeal to Court of Appeals	23
First intervention of minority stockholders	23
Second intervention of minority stockholders	24
First opinion of Court of Appeals	25
Third intervention of minority stockholders	25
Second opinion of Court of Appeals	26
Appeal to United States Supreme Court	28
Mandate from Supreme Court	28
Payment of judgment	30
Motion for entry of final decree	30
First memorandum opinion of District Court	30
Appointment of Special Master	31
Report of Special Master	32
Second memorandum opinion of District Court	32
Appeal to Court of Appeals	33
Decision of Court of Appeals	33
Argument	35-137
I. The issue before this court is the power of the District Court to reimburse the Trust Company for any of the items covered by its claim for solicitor and client costs	35-37

PAGE

II. The District Court had power to effect reimbursement of the Trust Company without regard to any other principle justifying the imposition of solicitor and client costs, for the reason that it was defending the Belt collateral against the attack of the Southern Company upon the title of its pledgor..... 38-44

III. (a) The mandate of this court on the former appeal dealt only with party and party costs, and not with solicitor and client costs, and has no bearing upon the issues herein..... 44-50

(b) The Act of February 26, 1853, regulates party and party costs only..... 50-63

IV. The Federal Courts are, by the Constitution, vested with the equity powers possessed by the High Court of Chancery in England at the time the Constitution was adopted. 64-65

V. (a) The English authorities allow solicitor and client costs even in the absence of a fiduciary relationship, where gross charges of fraud and misconduct have been made and not sustained..... 66-67

(b) Many authorities allow solicitor and client costs, even in the absence of a fiduciary relationship, where the litigation is so baseless and unwarranted as to justify an implication of bad faith..... 68-81

(c) Where a fiduciary relation exists between the parties, expenses occasioned by baseless and unwarranted litigation are taxable as solicitor and client costs against the offending party..... 81-90

VI. Gross charges of fraud and misconduct were made..... 91-96

VII. The main ground of the suit was false, unjust, vexatious, wanton and oppressive..... 96-118

VIII. Various fiduciary relationships were involved, and the Southern Company itself was trustee for the Trust Company..... 118-128

IX. There was a fund in court..... 128-130

X. Counsel fees and costs after June, 1910, are allowable.... 131-132

XI. Situation as to attorneys' fees in this country is not different from that in England..... 132-134

XII. Freedom from vexatious litigation is no less important than free access to the courts. The latter, if vexatious, should not be encouraged..... 134-137

Cases and Authorities Cited.

A.

	PAGE
Abbott v. Bradstreet, 3 Allen 587 (1862)	86
Act of 1789	55
Act of 1792	55
Act of 1793	55
Act of 1799	55
Act of 1847	55
Act of 1853	55
The Walter Adams, 271 Fed. 358 (1921)	89
Adamson v. Jarvis, 4 Bingham 66 (1827)	40
Allen v. City of Detroit, 167 Mich. 464, 133 N. W. 317 (1911)	71
American National Bank v. Warner, 176 S. W. 863 (Tex. Civ. App.) (1915)	84, 127
Anderson v. Marietta National Bank, 93 Okla. 241, 220 Pac. 883 (1923)	74
Andrews v. Barnes, L. R. 39 Ch. D. 133 (1887)	134
The Apollon, 9 Wheat. 362 (1824)	72
Arcambel v. Wiseman, 3 Dall. 306 (1796)	90
Atlantic Trust Co. v. Chapman, 208 U. S. 360, 28 S. Ct. 406 (1908)	43, 76
Attorney General v. Old South Society, 13 Allen 474 (1866)	83, 127
Attorneys & Solicitors Act of August 22, 1843, 6 & 7 Vict., Chap. 73	133
Attorneys & Solicitors Act of July 14, 1870, 33 & 34 Vict., Chap. 28	133
Ayckbourn, Practice of the High Court of Chancery, 7th Ed. (1861), p. 396	134

B.

In re Baldwin's Estate, (1900) 1 Irish L. R. 15	42, 130
Ballingale v. Hunsberger, 16 Pa. Super. Ct. 117 (1901)	38
The Baltimore, 8 Wall. 377	51
Baltimore Building and Loan Association v. Alderson, 99 Fed. 489, 39 C. C. A. 609 (1900)	46
Bank of Philadelphia v. Posey, 130 Miss. 530, 92 So. 840 (1922)	73
Barbour, The Practice of the Court of Chancery, (2d Ed.) (1875) V. 2, pp. 336-339	88
Bay Biscayne Co. v. Baile, 73 Fla. 1120, 75 So. 860 (1917)	42
Beach, Modern Equity Practice, (1894) Vol. 2, Sec. 1015	61
Beach v. Macon Grocery Co., 125 Fed. 513, 60 C. C. A. 557 (1903)	74
Beams, Costs in Equity, (2d Ed.) (1840) p. 24	39
Beams, Costs in Equity, (2d Ed.) (1840) Chap. 10	88
Beams, Equity Costs, 4	69
Beams, Equity Costs, 7	69
Beams, Equity Costs, 85	70

CASES AND AUTHORITIES CITED—Continued.

PAGE

Biddle's Appeal, 83 Pa. St. 340 (1877) 82
Blake, Practice of the Court of Chancery of the State of New York, 2d Ed., (1824) p. 558 57
Bramble v. Brett, 230 Fed. 385, 144 C. C. A. 527 (1916) 86
The Boston, 3 Fed. Cas. No. 1672 (1846) 70
Brueggemann v. Young, 128 Ill. App. 200 (1906) 46
Bruty v. Edmundson, L. R., (1917) 2 Ch. 285 66
Buell v. Kanawha Lumber Corp., 201 Fed. 762 (1912) 76
Burns v. Rosenstein, 135 U. S. 449 (1890) 89
Business Mens' Assurance Co. v. Campbell, 18 Fed. (2d) 223 (C. C. A., 8th Cir.) (1927) 60

C.

The Gordon Campbell, 131 Fed. 963 (1904) 61
Cantor v. American & Ocean Ins. Co., 3 Pet. 307 (1830) 88
Central Improvement Co. v. Cambria Steel Co., 201 Fed. 811, 815. 8, 25
Central Improvement Co. v. Cambria Steel Co., 210 Fed. 696 26
Central Railroad Co. v. Pettus, 113 U. S. 116 (1884) 130
In re Chenell, L. R. 8 Ch. D. 492 (1877) 82
Chicago & N. W. Ry. Co. v. Nye-Schneider-Fowler Co., 260 U. S. 35, 43 S. Ct. 55 (1922) 77, 134
Chicago Terminal Transfer Co. v. Bomberger, 130 Fed. 884, 65 C. C. A. 64 (1904) 71
Childs v. Ferguson, 181 Fed. 795, 104 C. C. A. 305 (1910) 64
City of St. Louis v. St. Louis Gas Light Co., 11 Mo. App. 237 (1881) 74
In re Clark, 174 Ia. 449, 154 N. W. 759 (1915) 70, 83, 127
Clark v. Anderson, 13 Bush (76 Ky.) 111 (1877) 82
Clark v. Chicago, M. & St. P. Ry. Co., 105 Fed. 552 (1900) 46
Congressional Globe, Volume 22, Appendix, p. 207 57
Corkery v. Dorsey, 223 Mass. 97, 111 N. E. 795 (1916) 71
Cuyler v. Atlantic & N. C. R. Co., 132 Fed. 570 (1904) 60
31 Cyc. 826 39

D.

The John D. Dailey, 158 Fed. 642 (1907) 90
Daniell's Chancery Practice, (1st Ed.) (1837) V. 3, p. 14 39
Daniell, Chancery Practice, (1st Ed.) (1837) Sec. 4, Chap. 27 88
Daniell, Pleading and Practice of the High Court of Chancery, 4th Am. Ed., (1871) V. 2, p. 1439 134
Darby v. Gilligan, 37 W. Va. 59, 16 S. E. 507 (1892) 82
Re Davies; Jenkins v. Davies, 64 L. T. R. 824 (1891) 86
Day v. Woodworth, 13 How. 363 (1851) 69, 90
Deggo v. Colebrook, 1 Atk. 395 (1738) 68

PAGE

Delcambre v. Murphy, 5 S. W. (2d) 789 (Tex. Civ. App.) (1928).. 74
Dewey v. Stratton, 114 Fed. 179, 52 C. C. A. 135 (1902)..... 43
D'Oechsner v. Scott, 24 Beavan 239 (1857)..... 66
Dungey v. Angove, 2 Ves. Jr. 304 (1794)..... 68
Drew v. Wakefield, 54 Me. 291 (1866)..... 86

E.

Ely-Walker Dry Goods Co. v. Colbert, 124 S. W. 705 (Tex. Civ. App.) (1910)..... 39
Ephriam v. Pacific Bank, 129 Cal. 589, 62 Pac. 177 (1900)..... 76

F.

Fagan v. Thompson, 38 Fed. 467 (1889)..... 38, 39
In re Famatina Development Corporation, Ltd., L. R. (1914) 2 Ch. D. 271..... 40
Fane v. Fane, L. R. 13 Ch. D. 228 (1878)..... 66
Farmers & Merchants Insurance Co. v. Dobney, 189 U. S. 301, 23 S. Ct. 565 (1902).....78, 79, 135
Fidelity Mutual Life Ass'n v. Mettler, 185 U. S. 308, 22 S. Ct. 662 (1901)..... 78
First National Bank v. Tenney, 43 Ill. App. 544 (1891)..... 40
Fleming v. Wilson, 6 Bush (69 Ky.) 610 (1869)..... 82
Forester v. Read, L. R. 6 Ch. App. 40 (1870)..... 66
In re Foster v. Great Western Ry. Co., L. R. 8 Q. B. D. 515 (1882). 134
Fontain v. Ravenel, 17 How. 369 (1854)..... 64
Fraser v. Cole, 214 Fed. 556..... 51, 54
The Elizabeth Frith, 8 Fed. Cas. No. 4361 (1831)..... 72
Frost v. Inhabitants of Belmont, 6 Allen 152 (1863)..... 87
Furness v. Union National Bank, 147 Ill. 570, 35 N. E. 624 (1893). 39

G.

Gates v. Parmly, 93 Wis. 294, 67 N. W. 739 (1896)..... 71
Geer v. Finn, 196 Mich. 738, 163 N. W. 20 (1917)..... 70
Globe Indemnity Co. v. Sulpho-Saline Bath Co., 299 Fed. 219, (C. C. A., 8th Cir.) (1924) certiorari denied, 266 U. S. 606.... 63
Godfrey v. Watson, 3 Atk. 517 (1747)..... 39
Goodyear v. Sawyer, 17 Fed. 2 (1883.....58, 60, 69, 89
Graham v. Railroad Co., 102 U. S. 148, 153..... 103
Gregory v. Pike, 67 Fed. 837, 15 C. C. A. 33 (1895)..... 38
Guardian Trust Co. v. Kansas City Southern Railway Co., 28 Fed. (2d) 233..... 33

PAGE

Guardian Trust Co. v. Kansas City Southern Ry. Co., 171 Fed. 43 (1909) 17
Guardian Trust Co. v. Kansas City Southern Ry. Co., 146 Fed. 337 (C. C. A., 8th) 17
Gulf Refining Co. v. United States, 269 U. S. 125, 46 S. Ct. 52 (1925) 47
Gulf & S. I. R. Co. v. Walker, 104 Miss. 363, 61 So. 458 (1913) 73

H.

Halsbury, Laws of England, V. 21, p. 238 ..... 39, 42
Halsbury, Laws of England, V. 28, p. 161 83
Halsbury, Laws of England, V. 23, p. 183 134
Halsbury, Laws of England, V. 26, p. 798 134
Harrison v. Perea, 168 U. S. 311, 18 S. Ct. 129 (1897) 87
Hastings v. Spenser, 11 Fed. Cas. No. 6201 (1853) 71
Hawkins v. Cleveland, C. C. & St. L. R. Co., 99 Fed. 322, 39 C. C. A. 538 (1900) 48
Hennessy v. Sheldon, 12 Wall. 440 (1870) 136
Hernandez v. Brookdale Mills, 232 N. Y. 552, 134 N. E. 568 (1921) 74
Hill on Trustees, (1867) p. 566 83
The Ellen Holgate, 30 Fed. 125 (1887) 71
Home Life Insurance Co. v. Fisher, 188 U. S. 726, 23 S. Ct. 380 (1902) 78, 135
House v. Amsdell Brewing and Malting Co., 117 N. Y. S. 796, 133 App. Div. 486 (1909) 46
Hurst v. Coley, 22 Fed. 183 (1884) 42
The Hurtsdale, 171 Fed. 607 (1909) 90
Hutchinson Box Board & Paper Co. v. Van Horn, 299 Fed. 424 (C. C. A., 8th Cir.) (1924) 84

I.

Ibberson v. Worth, 1 Jur. (N. S.) 440 (1855) 66
Individual Drinking Cup Co. v. Union News Co., 250 Fed. 625, 162 C. C. A. 641 (1918) 65
Iowa Life Insurance Co. v. Lewis, 187 U. S. 335, 23 S. Ct. 126 (1902) 78

J.

Jacobsen v. Lewis Klondike Exposition Co., 112 Fed. 73, 50 C. C. A. 12 (1901) 90
Ex parte Jaffray, 13 Fed. Cas. No. 7170 (1869) 60, 86
The Robert Jenkins, 22 Fed. 797 (1885) 70
Jerman v. Stewart, Gwynne & Co., 12 Fed. 271 (1882) 62
Johnson v. Blanchard, 7 Fed. 597 (1885) 70

PAGE

Jones, Collateral Securities, 3d Ed., Sec. 400 39
Jordan v. Agawam Woolen Co., 13 Fed. Cas. No. 7516 (1869) .. 62
Joslyn v. Parlin, 54 Vt. 670 (1881) 73

K.

Kaempfer v. Taylor, 78 Fed. 795 (1897) 62
Kansas City Southern Railway Co. v. Guardian Trust Company, 240 U. S. 166, 36 S. Ct. 334 28
Karns v. Imlay Rapid Cyanide Process Co., 181 Fed. 751 (1910) 64
Kell v. Trenchard, 146 Fed. 245 46
Kevan v. Crawford, L. R. 6th D. 29 (1877) 66
Kirby v. Lake Shore & M. S. R., 120 U. S. 130 (1886) 64
Koelble v. Runyan, 158 N. E. 279 (Ohio) (1927) 87

L.

In re Lacov, 142 Fed. 960, 74 C. C. A. 130 (1905) 74
Leary v. United States, 257 Fed. 246 ..... 51, 54
Lewin on Trusts, 8th Ed. (1891), V. 3, p. 987 83
Lindley v. Denver, 259 Fed. 83, 170 C. C. A. 151 (1919) 65
Loring v. Marsh, 15 Fed. Cas. No. 8515 (1865) 65
Louisiana State Lottery Co. v. Clark, 16 Fed. 20 (1883) 60, 87
Louisville & N. R. Co. v. Dickerson, 191 Fed. 705, 112 C. C. A. 295 (1911) 79
Louisville & N. R. Co. v. Stewart, 241 U. S. 261, 36 S. Ct. 586 (1915) 135
Lycan v. Miller, 56 Mo. App. 79 (1894) 82

M.

McCloskey v. Bowden, 82 N. J. E. 410, 89 At. 528 (1914) 71
McCloskey v. Kirk, 243 Pa. 319, 90 At. 73 (1914) 71
McGaw v. Acker, Merrall and Condit Co., 111 Md. 153, 73 At. 731 (1909) 83, 127, 130
McIntosh v. Ward, 159 Fed. 66 ..... 51, 53
Madden v. Rosseter, 192 N. Y. S. 113, 117 Misc. Rep. 244 (1921) 84, 127, 130
Mangnetto v. Crankshaw, 26 R. I. 453, 59 At. 309 (1904) 80
Marks v. Leo Feist, 8 Fed. (2d) 460 54
Masserne v. Lyndon, 2 Brown 291 (1788) 68
Matheson v. Hanna-Schoelkopf Co., 128 Fed. 162 (1904) 62, 65
Mayhew v. Phoenix Insurance Co., 23 Mich. 105 (1871) 67
In re Mead, 16 Fed. Cas. No. 9364 (1871) 86
Mecartney v. Guardian Trust Company, 274 Mo. 224 (1918) 132

PAGE

Mecartney v. Guardian Trust Company, 280 Fed. 64 (C. C. A., 8th Cir.) (1922) 132
Meeker v. Lehigh Valley R. Co., 236 U. S. 412, 35 S. Ct. 328 (1914) 79, 135
Meyers v. Block, 120 U. S. 206 (1886) 43
Michigan Aluminum Foundry Co. v. Aluminum Co. of America, 190 Fed. 903 (1911) 63
Mills v. Lehigh Valley R. Co., 226 Fed. 812 (1915) 46
Minuse v. Cox, 5 Johns. Ch. 441 (1821) 82
Mississippi Mills v. Cohn, 150 U. S. 202 (1893) 64
Missouri, K. & T. R. Co. v. Elliott, 184 U. S. 530 ..... 51, 52
Missouri, K. & T. R. Co. v. Harris, 234 U. S. 412, 34 S. Ct. 790 (1913) 78
Missouri, K. & T. R. Co. v. Cade, 233 U. S. 642, 34 S. Ct. 678 (1914) 78, 79, 134
Missouri P. R. Co. v. Larabee, 234 U. S. 459 ..... 49, 51, 52
Mordue v. Palmer, L. R. 6 Ch. A. C. 22 (1870) 134
Motion Picture Patents Co. v. Steiner, 201 Fed. 63 ..... 51, 54, 80
Murphy v. Loos, 32 Ill. App. 595 (1889) 46
Myers v. Frankenthal, 55 Ill. App. 390 (1894) 74

N.

National Surety Co. v. Lyons, 16 Fed. (2d) 688 (C. C. A., 8th Cir.) (1926) 60, 63
In re Neil's Will, 172 N. Y. S. 79, 184 App. Div. 507 86
Newton v. Consolidated Gas Co., 265 U. S. 78, 44 S. Ct. 481 (1923) 43, 61, 70, 89
Niday v. Graef, 279 Fed. 941 (C. C. A., 9th Cir.) (1922) 87
North Missouri Railroad Co. v. Lackland, 25 Mo. 515 (1857) .. 74
North Missouri Railroad Co. v. Reynal, 25 Mo. 534 (1857) 74
J. E. North Lumber Co. v. Gary, 83 Miss. 640, 36 S. 2 (1904) .. 73

O.

Oelrichs v. Williams, 15 Wall. 211 51
O'Neal v. Spivey, 145 S. E. 71 (Ga.) (1928) 73

P.

Page v. Rogers, 211 U. S. 575, 29 S. Ct. 159 (1909) 43
Palmer v. Walesby, L. R. 3 Ch. A. C. 732 (1868) 68
Parker v. Watkins, Johnson's Reports 133 (1858) 39
In re Paschal, 10 Wall. 483 (1870) 59
Passingham v. Sherborn, 9 Beavan 424 (1839) 66
Patrick v. Patrick, 71 N. J. E. 347, 63 At. 848 (1906) 87
Patterson v. Ball, 18 Fed. Cas. No. 10, 823 (1809) 73

PAGE

Patterson v. Northern Trust Co., 286 Ill. 564, 122 N. E. 55 (1919) 82
Payne v. Hook, 7 Wall. 425 (1868) 64
People of Sioux County v. National Surety Co., 276 U. S. 238, 48 S. Ct. 239 (1928) 59
Perry, Trusts and Trustees, 7th Ed. (1929), V. 2, Sec. 894 83
In re Peterson, 253 U. S. 300, 40 S. Ct. 543 (1919) 61, 62, 89
Case of Pettit, 19 Fed. Cas. No. 11,047 71
Pickett & Sexton v. School District of Kansas City, 193 Mo. App. 519, 186 S. W. 533 (1916) 87, 130
Planters Rice Mill Co. v. Merchants National Bank, 78 Ga. 574, 3 S. E. 327 (1887) 39, 130
Porter v. Steel Co., 120 U. S. 649, 673 103

R.

Randolph v. Scruggs, 190 U. S. 533, 23 S. Ct. 710 (1902) 86
Receivers of Virginia Iron, Coal & Coke Co. v. Staake, 133 Fed. 717, 66 C. C. A. 547 (1904) 87
Rennett v. Green, 1 Cox Ch. Cas. 253 (1786) 68
Robinson v. Campbell, 3 Wheat. 212 (1818) 64
Russell v. Farley, 105 U. S. 433, 437 (1881) 43, 64

S.

Sandon v. Hooper, 6 Beav. 246 (1843) 39
In re Sanford Fork and Tool Co., 160 U. S. 247, 16 S. Ct. 291 (1895) 45, 47
In re Schocket, 177 Fed. 583 (1910) 61, 70, 76
Seibert v. Minneapolis & St. L. Ry. Co., 58 Minn. 58, 57 N. W. 1068 (1894) 37
Selz, Schwab & Co. v. Guthman, 62 Ill. App. 624 (1895) 40
Shannon v. Angelique, 21 Fed. Cas. No. 12, 705 (1856) 87
Ex parte Simpson, 15 Ves. Jr. 476 (1809) 66
Simpson v. Malherbe, 4 Gifford 707 (1865) 68
Sizer v. Many, 16 How. 98 (1853) 46
Smith, Chancery Practice (2d Ed.) (1837), V. 1, pp. 697-700 . . 88
Solicitors Remuneration Act, of August 22, 1881, L. R. Gen. Pub. St., V. 17, Chap. 44 133
The South Portland, 95 Fed. 295 (1899) 90
Southern Ry. Co. v. Gadd, 233 U. S. 572, 34 S. Ct. 696 (1913) . . 135
Spaulding v. Tucker, 22 Fed. Cas. No. 13,221 (1871) 62
Spring Garden Insurance Co. v. Amusement Syndicate Co., 178 Fed. 519, 102 C. C. A. 29 (1910) 73
St. Louis and San Francisco R. Co. v. Barker, 210 Fed. 902 (1914) 46

PAGE

Stafford v. Mott, 3 Paige 100 (1832) 71
Stallo v. Wagner, 245 Fed. 636, 158 C. C. A. 64 (1917) 61, 69, 70
In re Starr, 103 At. 392 (N. J.) (1918) 82
State of Pennsylvania v. Wheeling Bridge Co., 18 How. 460 (1855) 64
E. G. Staude Mfg. Co. v. Labombarbe, 243 Fed. 362, 156 (C. C. A. 142) (1917) 81
In re Stewart, 179 Fed. 222, 102 C. C. A. 348 (1910) 86
Story v. Livingston, 13 Pet. 359 (1839) 64
Street, Federal Equity Practice (1909), Vol. 2, Sec. 2034 ..... 61, 88
The Sydney, 47 Fed. 260 (1891) 48
Syndicate Imp. Co. v. Bradley, 6 Wyo. 171, 43 Pac. 79, 44 Pac. 60 (1896) 80

T.

Tesla Electric Co. v. Scott, 101 Fed. 524 (1900) 61
Tevander v. Ruysdael, 299 Fed. 746 (C. C. A., 7th Cir.) (1924) ... 130
Texas & Pacific Ry. Co. v. Prater, 229 U. S. 177, 33 S. Ct. 637 (1913) 135
Thome v. Allen, 24 Ky. L. R. 987, 70 S. W. 410, 71 S. W. 431 (1903) 82
Thomson v. Wooster, 114 U. S. 104 (1884) 88
Title Insurance Co. v. California Development Co., 179 Cal. 734, 178 Pac. 857 (1919) 46
Trustees v. Greenough, 105 U. S. 527 .....53, 59, 63, 84
Tullock v. Mulvane, 184 U. S. 497 ..... 51, 52
Turner v. Collins, L. R. 12 Eq. Cas. 438 (1871) 68, 82, 134
Turner, Practice and Costs in the High Court of Chancery (3d Ed.) (1804) 88
Twist v. Babcock, 48 Mich. 513, 12 N. W. 680 (1882) 71

U.

Ex parte Union Steamboat Co., 178 U. S. 317, 20 S. Ct. 904 (1900) 45, 47
United States v. Pan American Petroleum Co., 24 Fed. (2d) 206 (1927) 46, 48
United States v. Waters, 133 U. S. 208 (1889) 59
United States Code Annotated, Title 49, Sections 8 and 16 (2) ... 79
United States Code Annotated, Title 28, Section 824 ..... 80, 135
United States Code Annotated, Title 28, Section 819 ..... 80, 135
United States Code Annotated, Title 28, Sections 825-829 ..... 80, 135
United States Code Annotated, Title 17, Section 40 ..... 81, 135

W.

	PAGE
Walters v. Woodbridge, L. R. 7 Ch. Div. 504 (1878)	126
Walworth, Rules and Orders of the Court of Chancery of the State of New York, (1839) p. 193	57
Waterman v. Canal-Louisiana Bank and Trust Company, 215 U. S. 33, 30 S. Ct. 10 (1909)	64
In re Wells & Croft, 15 Reports 169 (1894)	40
In re Wentworth Lunch Co., 191 Fed. 821 (112 C. C. A. 335) (1911)	74
West v. Brashear, 14 Pet. 51 (1840)	47
Western Union Telegraph Co. v. Louisville & N. R. Co., 208 Fed. 581 (1913)	62, 90
Weston v. Watts, 45 Hun. 219 (1887)	74
Whitehead v. Darling, 5 S. W. 356 (Ky.) (1887)	40
Wilcke v. Duross, 144 Mich. 243 (107 N. W. 907) (1906)	71
Williams v. Lister & Co., 109 L. T. R. 699 (1913)	40
Williams v. MacDougall, 39 Cal. 80 (1870)	86
Williamson v. Liverpool & London Ins. Co., 141 Fed. 54 (C. C. A., 8th Cir.) (1905)	63
Wittenberg v. Fisher, 183 Mo. App. 347, 166 S. W. 1106 (1914)	80
Woodworth v. Old Second National Bank, 154 Mich. 459, 118 N. W. 581 (1908)	84, 127
In re Wright, 16 Fed. 482 (1883)	72

In the Supreme Court of the United States

October Term, 1929.

No. 22.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,

vs.

GUARDIAN TRUST COMPANY, *Respondent.*

STATEMENT AND BRIEF FOR RESPONDENT.

STATEMENT.

The pertinent facts and proceedings involved in this case, so far as they affect the substantial rights of the parties, have been three times set forth and determined by the United States Circuit Court of Appeals for the Eighth Circuit, and appear in 201 Fed. 811, 210 Fed. 696, and 28 Fed. 2d, 233. The facts so found by the court form the basis of the present proceeding, which

seeks to have a proper taxation of costs paid out by the respondent in defending the litigation. On the merits, the final decision has been in favor of respondent. It remains to determine whether the District Court had power, under the facts resulting in such decision, to allow the respondent certain extraordinary costs.

We contend that all the facts essential to sustain that power have been found by the Circuit Court of Appeals upon the former appeal; that such finding as to the facts is final and conclusive upon the parties hereto, and that the petitioner is not entitled to relitigate them in this proceeding. The Circuit Court of Appeals found, we submit, the following facts:

That the Southern Company caused the Cambria suit to be filed and that such suit was in fact the suit of the Southern Company;

That it was a baseless and unwarranted action, filed for the ulterior purpose of wrongfully depriving the Trust Company of the collateral pledged to it as security for the debt of the Belt Company;

That the bills filed by the Belt Company and its receivers were also filed at the instance and for the benefit of the Southern Company and that such bills were in fact the bills of the Southern Company.

We believe that the decisions of the Court of Appeals, the bills and petitions filed by the Cambria, Belt and Southern Companies, and the report of the master will be all of the voluminous record which this court need to examine. However, in order that the court may have the whole picture before it, we are giving what we believe to be a fair resume of the facts disclosed by the record upon which the Court of Appeals acted and upon which the power of the District Court depends.

THE FACTS.

The Guardian Trust Company was organized as a Missouri trust company in 1889. The Company was a flourishing institution and during the period from 1889 to 1900 played a large part in financing various railroad and other enterprises in and around Kansas City, Missouri.

The enterprises financed by and through the Trust Company, and whose affairs are involved in this proceeding, were Kansas City Suburban Belt Railroad Company, Consolidated Terminal Railway Company, the Union Terminal Railroad Company, Kansas City and Independence Air Line, The Kansas City Suburban Belt Railroad Company (a consolidation of Kansas City Suburban Belt Railroad Company and Consolidated Terminal Railway Company), Missouri Elevator and Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, Northern Townsite Company, The Port Arthur Channel & Dock Company, Kansas City, Pittsburg & Gulf Railroad Company and Kansas City and Northern Connecting Railroad Company.

The Kansas City and Independence Air Line and the Union Terminal Railroad Company were subsidiaries of the Kansas City Suburban Belt Railroad Company. The three functioned as a unit, were generally referred to collectively as the "Belt Company," and owned and operated a belt line or terminal system in Kansas City and its environs, from Grandview in Jackson County, Missouri, to the stockyards in Argentine, Kansas. The Port Arthur Channel & Dock Company owned and operated a similar terminal system at Port Arthur, Texas. The Kansas

City, Pittsburg & Gulf Railroad Company owned and operated a trunk line from a connection with the Belt Line at Grandview, to a connection with the Dock Company's road at Port Arthur.

The Central Improvement Company, also a Belt Company subsidiary, held the title to valuable terminal lands appurtenant to the Belt Line. The Missouri Elevator and Terminal Company owned grain elevators along the Belt Line. Fairmount Amusement Company, which operated an amusement park known as Fairmount Park, had been organized to promote passenger traffic on the Belt Line. The Kansas City and Northern Connecting Railroad Company was formed to build a connecting road between the Belt Line in Kansas City and the town of Pattonsburg, Missouri, to provide certain northern railroads with an entrance into Kansas City. The Northern Townsite Company held title to certain townsites on this proposed road to Pattonsburg.

With all these companies the Guardian Trust Company had had, up to 1900, a continuous course of dealing, extending over a period of years, resulting in thousands of transactions involving millions of dollars. All of the railroad companies named had issued bonds, totaling many millions of dollars. The Trust Company was corporate trustee in the railroad mortgages securing the bonds. The securities of the railroads had been marketed by them through the agency of the Trust Company, it receiving a commission for its services. It had, furthermore, advanced money to them for pressing needs, and acted as their banker and fiscal agent.

John W. Gates, of Chicago, had purchased heavily of the securities of the railroad companies mentioned. Gates also purchased stock in the Trust Company, but his interest in the railroad was much greater than in the

Trust Company. In 1899 Gates and Stilwell, president of the Trust Company, became involved in a bitter personal controversy, and Gates sought, but without success, to oust Stilwell from the control of the Trust Company. Thereafter Gates was bitterly antagonistic toward the Trust Company. (Rec. V. 2, p. 672.)

On April 1, 1899, receivers were appointed for the Kansas City, Pittsburg & Gulf Railroad Company. Gates and his associates, heavily interested in the bonds of the company, organized themselves into a bondholders' reorganization committee to reorganize the finances of the company. It was recognized that any new or successor company must acquire the Port Arthur Channel & Dock Company properties and the Belt Line properties in Kansas City, in order that the new company might have one continuous line of road from Kansas City to the Gulf.

To this end, in November, 1899, the committee promulgated a plan of reorganization whereby it proposed to organize a new company, to be called the Kansas City Southern Railway Company, and offered the bondholders and stockholders of the Belt Company and the Dock Company securities of the new company in exchange for their holdings in the old companies. The plan contemplated, also, the payment of the floating debts of the old companies. At this time the Belt Company was a solvent going concern. Pursuant to the proposals, the holders of substantially all of the outstanding stocks and bonds of the Belt and Dock companies deposited their securities in exchange for new securities of the proposed company. (See 201 Fed. 813.)

On March 19, 1900, the Gulf Company properties were sold at foreclosure to Max Pam, Gates' personal attorney. Pam on the same day conveyed the property to the Kan-

sas City Southern Railway Company, which had been incorporated a few days before. On April 1, 1900, the Southern Company demanded the resignations of the then officers and directors of the Belt Company, and from that date the Belt Company was wholly in the control, and functioned as a part, of the Kansas City Southern Railway Company.

The Trust Company had, during the years of its close association with the Belt Company, made large loans to the Belt Company, represented by the notes of the latter, often secured by the pledge of stock or bonds of the Belt's subsidiary companies. Between September 23, 1898, and November 27, 1899, the Belt Company executed promissory notes to the Trust Company totaling over $700,000. (Rec. V. 2, p. 752.) At the time of the Gulf Company foreclosure and sale, the indebtedness of the Belt Company to the Trust Company was about $400,000. As security for this indebtedness the Trust Company held miscellaneous securities of the Belt Company subsidiaries (Rec. V. 2, p. 755), the most valuable of which were 1120 shares of stock (being substantially all) of the Central Improvement Company. This company owned terminal lands worth over $200,000.

On September 1, 1900, the indebtedness of the Belt Company to the Trust Company being in default and unpaid, the Trust Company gave written notice to the Belt Company that unless the debt were paid in the meantime, it would on September 7, 1900, proceed to sell, under the terms of the pledge, the securities pledged with it, for application on the debt.

On September 6, 1900, the Cambria Steel Company, a Pennsylvania corporation, appearing by Frank Hagerman and L. C. Krauthoff, filed a suit at law in the Federal Court in Kansas City, against the Belt Com-

pany, on an open account for steel rails furnished. The fact was, though no reference to it was made in the suit, that the Cambria Company held the same sort of collateral for its debt as did the Trust Company. (Rec. V. 2, p. 672.) The Belt Company, through an associate of Mr. Pam (who was then counsel for the Kansas City Southern Railway Company) waived summons and confesssed judgment, on the same day. At the same time, on the same day, execution was issued against the Belt Company, and at the request of the attorneys of the Cambria Company, was returned *nulla bona*, without any attempt being made to have the execution satisfied.

On the same day, in the same court, and appearing through the same attorneys, the Provident Life and Trust Company, a co-trustee in the Belt, Union Terminal, Air Line and Consolidated Terminal mortgages, filed four separate bills for the foreclosure of those mortgages. As a preliminary to these suits, the Kansas City Southern Company, then holding all of the bonds issued by said railroad companies, as the result of the Reorganization Plan, had, under powers given in the mortgages, removed the Guardian Trust Company as co-trustee in the mortgages. These foreclosure suits were later consolidated, and were consummated by a foreclosure sale, the Kansas City Southern being the purchaser at the sale. At about the same time, and in the same manner, through a foreclosure suit in the Federal Court in Texas, the Kansas City Southern acquired the properties of the Port Arthur Channel & Dock Company.

The Trust Company was a party to the Belt foreclosure suits, and before the decree was entered, it asked that the Southern Company be made a party, and asked leave to file an amended supplemental answer asserting that the Southern Company, as the successor of the Belt

Company, and by virtue of its agreement to pay the Belt indebtedness, was liable to the Trust Company for the Belt indebtedness to it. The court denied leave to file such answer, but on condition that the complainant should file a stipulation that the decree should be without prejudice to the claim of the Trust Company against the Southern Company. The last paragraph of the foreclosure decree expressly saved and reserved to the Trust Company the rights to plead and insist in any other present or future litigation that the Southern Company was liable to it for the Belt indebtedness. (See findings to this effect in *Central Improvement Co.* v. *Cambria Steel Co.*, 201 Fed. 811, 815.)

On the same day (i. e., September 6, 1900), in the same court, and appearing through the same attorneys, the Cambria Steel Company filed its creditors' bill, based upon the confessed judgment against the Belt Company procured on that day (upon a petition that day filed, as above set forth), naming as defendants the Belt Company and its subsidiaries, and the Guardian Trust Company. (Rec. V. 2, pp. 3-20.) With the filing of this Cambria bill on September 6, 1900, the present litigation began.

The allegations of the bill will be noted more in detail in a later connection. However, the bill asserted that the Trust Company organized, dominated, controlled and manipulated the Belt Company and its subsidiaries pursuant to a fraudulent scheme and design for the exploitation and wholesale fleecing of those companies and the investors in their securities; that the Trust Company, as trustee in the railroad mortgages, and as trustee for and agent of the companies in managing and disposing of their stocks, bonds and other assets, committed flagrant breaches of trust, resulting in millions of dollars of loss to said companies; that the Trust Company had failed

to account for, and had converted to its own use, some $7,000,000 of securities of the Belt Line companies; that the Trust Company caused to be formed the Elevator, Amusement, Central and Townsite Companies, with the fraudulent intent and purpose of defeating the creditors of the railroad companies, by the diversion of assets rightly belonging to those companies; that the Trust Company wrongfully and fraudulently charged to the Belt Company a loss of over $300,000 incurred by the Trust Company in constructing the Pattonsburg road; that for the purpose of hindering, delaying and defrauding the creditors of the Belt Company in the collection of their respective demands, and particularly the Cambria Company in the collection of its judgment, the Trust Company made various false and unfounded claims and demands against the Belt Company, and caused the Belt Company to go through the form of executing a number of pretended promissory notes, aggregating about $500,000, to the Trust Company, and for the pretended purpose of securing the payment of said pretended notes, caused the Belt Company to deposit with the Trust Company various named securities of the Belt subsidiaries.

The bill further alleged that the Trust Company was totally insolvent; that it had outstanding a large number of matured obligations, the holders of which were pressing for payment, and that it was wholly unable to meet such demands; that it was threatening to sell the notes which it fraudulently caused the Belt Company to go through the form of executing, and the collateral pretended to be pledged as security therefor—all to the end that the creditors of the Belt Company might be hindered, delayed and defrauded; that the property of the Elevator, Amusement, Central and Townsite Companies in equity belonged to the Belt Company, and that it is necessary

for the protection of the creditors of the Belt Company that receivers be appointed for said companies.

The bill prayed (a) that an accounting be taken of the various transactions and dealings between the Trust Company and the Belt Company, or by the Trust Company as trustee and agent of and for the Belt Company, and that the Trust Company be required to pay the balance found to be due the Belt Company, plus all losses incurred in transactions by the Trust Company with the property of the Belt Company; (b) that the Trust Company be decreed to hold the pledged securities of the Belt subsidiaries in trust for the creditors of the Belt Company; (c) that the property and assets of the Elevator, Amusement, Central and Townsite Companies be declared to be in equity the property of the Belt Company and chargeable with the debts of the Belt Company; and (d) that a receiver be appointed for the Belt Company and its property and of the property of the subsidiary companies; and that the Trust Company be enjoined from selling or disposing of the Belt Company notes and collateral.

After the bill was filed, and on the same day, the Belt Company entered its appearance in the cause (Rec. V. 2, p. 28), and on that day, upon inspection of the bill and without notice to the Trust Company, the court granted the injunction prayed for and appointed receivers for the Belt Company. (Rec. V. 2, p. 28.)

On the same day, September 6, 1900, the court appointed receivers for all of the Belt subsidiary companies.

It may also be stated that shortly thereafter, on October 23, 1900, Gates and his associates, appearing by the same attorneys who filed the Cambria bill, filed their bill for the appointment of a receiver for the Guardian Trust Company, asserting, as one of the grounds for the ap-

plication, the predicament of the Company occasioned by the huge claims made against it in the Cambria bill. A receiver was appointed, but was discharged two years later.

On November 5, 1900, the Trust Company answered the Cambria bill. (Rec. V. 2, p. 33.) The answer, after denying the allegations of fraud and misconduct contained in the bill, alleged that the Cambria suit against the Trust Company and the Provident Life and Trust Company suit for the foreclosure of the Belt mortgages, were fraudulently and conclusively brought, pursuant to a fraudulent scheme of the Belt Company and the Kansas City Southern Railway Company to defraud the creditors of the Belt Company, including the Trust Company; that there had in fact been no bona fide default in the payment of the Belt mortgages; and that the Belt Company and the Southern Company induced the Cambria Company to bring this suit, under an agreement to indemnify it from loss and expenses in connection therewith and to see that its debt was fully paid. The answer asserted that the Trust Company never, until the filing of the bill of complaint, had any knowledge or information that there was any claim or pretense in any quarter that it owed the Belt Company anything, or that the Belt Company did not owe it the amounts specified in the promissory notes executed by the Belt Company. It denied that any request had been made by the Belt Company for an accounting (as alleged in the bill) and denied that the Cambria Company ever had any information or belief that such a request had been made; and denied that the complainant in good faith desired an accounting.

On December 3, 1900, the Cambria Steel Company replied to the answer of the Trust Company merely by as-

serting that the answer was very uncertain, evasive and insufficient in law to be replied unto. (Rec. V. 2, p. 95.)

The receivers of the Belt Company filed an ancillary bill of complaint on November 20, 1901, through attorneys who also represented the Kansas City Southern Railway Company. (Rec. V. 2, p. 97.) This bill substantially repeated the allegations of the Cambria bill, except that in many instances the charges of fraud and breach of trust on the part of the Trust Company were enlarged upon. It alleged in addition to the allegations contained in the Cambria bill, that the Trust Company, while acting as agent for the Belt Company, took out of the earnings and assets of the Belt Company large sums of money which it pretended to expend for and on behalf of the Belt Company, but which in fact it did not expend for the Belt Company, and for which it never accounted; that the Belt Company furnished to the Trust Company large sums of money for the purchase of property to be held by the Elevator Company, the Amusement Company, the Townsite Company and the Central Improvement Company, and that the Trust Company, though often requested so to do, had never accounted for the same; that certain shares of stock of the Central Improvement were, though belonging to the Belt Company, issued to the Trust Company, and it disposed of the same, without accounting therefor to the Belt Company; and that $350,000 was furnished by the Belt Company to the Trust Company to be expended in fitting up Fairmount Park, for which the Trust Company never accounted.

Upon the filing of this ancillary bill, the Cambria Steel Company practically disappeared from the case.

On February 27, 1905, the Kansas City Southern Railway Company filed an intervening petition in the cause. (Rec. V. 2, p. 166.) This petition contained many of the

allegations of fraud and breach of trust on the part of the Trust Company, made in the original and ancillary bills. It alleged, in addition to these allegations, that the Trust Company, while acting as agent and trustee of the Kansas City Northern Connecting Railroad Company, had taken 1130 of the first mortgage bonds of the Connecting Company, owned by the Belt Company, and worth $845,415:00; 16 second mortgage bonds of the Connecting Company, owned by the Belt Company, worth $7,200.00; 6250 shares of stock of the Connecting Company, owned by the Belt Company, worth $37,500.00. The petition also alleged that on or about July 20, 1899, the Trust Company took from the Belt Company 3920 shares of stock of the Connecting Company which it claimed to hold as collateral security for an alleged indebtedness from the Belt Company to it, and disposed of said stock for $19,885.71. The Southern Company asserted that the Trust Company was indebted to it in connection therewith in the sum of $995,415.00 and alleged that the lands of the Central Improvement Company and all the collateral held by the Trust Company for the alleged indebtedness of the Belt Company to it passed under the after acquired property clause of the Belt Company mortgage.

In its answer filed March 7, 1905, to the intervening petition of the Southern Company, the Trust Company, after putting in issue the allegations of said petition, asserted that the Southern Company, as the successor of the Belt Company, and by reason of the agreement made by it to pay the Belt Company debts, was liable to the Trust Company for that indebtedness. (Rec. V. 2, pp. 186, 200.)

On March 22, 1905, the Belt Company receivers filed an Amended and Supplemental Ancillary Bill. (Rec. V. 2,

p. 202.) This bill fixed the amount which the Trust Company, while in domination and control of the Belt Company, took out of its earnings and assets, which it pretended to, but did not, expend for and on account of the Belt Company, and for which it never accounted, at $500,000. The bill enumerated a great list of other claims against the Trust Company, not mentioned in the previous bills, totaling more than $4,000,000 in amount. They were based upon charges of conversion, breach of trust, falsification of accounts and if we understand rightly plain stealing. Apparently the bill attacked every transaction between the Trust Company and each and all of the railroad and subsidiary companies from the organization of the respective companies down to that date. Among other things, the bill claimed that all commissions and trustee's fees charged by the Trust Company for its services, as agent, in disposing of the securities of the railroad and subsidiary companies, were unlawfully collected, and that the Belt was entitled to credit therefor. This on the theory that the Trust Company absolutely dominated and controlled said companies, and used them and each of them as its own instrumentality or dummy for its own benefit and profit, and that the Trust Company occupied a fiduciary relation to said companies, and that contracts with said companies for compensation were unlawful.

Many of the transactions attacked in this bill occurred more than ten years prior to the filing of the original Cambria bill, and more than 15 years prior to the filing of the bill in which the charges were, for the first time, made.

On May 1, 1905, the Kansas City Southern Railway Company filed its amended intervening petition in the cause. (Rec. V. 2, p. 269.) This petition set up, in ad-

dition to the allegations contained in prior bills, a cause of action against the Trust Company arising out of its breach of duty as a trustee under the Union Terminal Railroad mortgage dated February 1, 1893. The petition alleged that the Trust Company, unmindful of its duties as such trustee, sold the bonds of said company to innocent purchasers for value, and unlawfully and improperly diverted the proceeds of said sales from the purposes for which they were intended, and unlawfully and improperly used said proceeds to diminish from time to time the alleged indebtedness from the Belt Company to it; that bonds of the Union Company of the par value of $1,350,000 and of the actual value of $1,215,000 were thus diverted by the Trust Company from the uses and purposes for which the bonds were issued, as the Trust Company at all times well knew; and that after the completion and equipment of the Union Company, and when there was no occasion or necessity for a sale or disposition of said bonds, the Trust Company in violation of its duties as trustee, fraudulently sold and put afloat additional bonds of the Union Company.

In its answer, filed May 20, 1905, to the amended intervening petition of the Southern Company, the Trust Company, among other allegations, renewed its assertion that the Southern Company, as the successor of the Belt Company, and by reason of its agreement to pay the Belt indebtedness, was liable for the indebtedness of the Belt Company to the Trust Company. (Rec. V. 2, pp. 293, 311.)

On November 16, 1907, the Kansas City Southern Railway Company and the Belt Company and its receiver jointly filed a supplemental bill in the cause (Rec. V. 2, p. 477). The new matter alleged concerned three suits filed in the Circuit Court of Jackson County, Missouri,

two on March 15, 1905, and one on July 2, 1906, by the Guardian Trust Company against the Kansas City Southern, and which had been set down for trial on the docket of that court on December 2, 1907. The first two suits had been brought against the Southern Company by the Trust Company, on the Belt indebtedness to it, on the theory that the Southern Company was liable for that indebtedness as the successor of the Belt Company and by reason of an agreement to pay that indebtedness as a part of the plan for the reorganization of the Gulf, Dock and Belt Companies. The third suit was brought by the Trust Company against the Southern Company on certain indebtedness owing to the Trust Company by the Kansas City, Pittsburg & Gulf Railroad Company, on the theory that the Southern Company, as the successor of the Gulf Company, was liable for that indebtedness. The bill sought to have the prosecution of these three state court suits enjoined. It alleged that by reason of the prior institution of this action and the filing of the various bills and the various proceedings therein, the federal court had acquired a prior and superior equitable jurisdiction over all the parties to the proceeding and all the issues therein involved; that by the injunction issued at the outset against the sale of the collateral held by the Trust Company, as well as by its subsequent proceedings, the court took possession of and impounded the notes in question, and had assumed possession and jurisdiction over the notes, bonds, assigned accounts and other property held by the Trust Company as collateral to its pretended indebtedness against the Belt Company; and such property was alleged to be within the exclusive jurisdiction and control of the federal court.

On the day upon which this bill was filed, the court

granted a temporary restraining order against the further prosecution of the state court suits (Rec. V. 2, p. 554). On February 22, 1908, this injunction was made permanent (Rec. V. 2, p. 561). A motion to dissolve the injunction having been denied (Rec. V. 2, p. 567), the Trust Company appealed from said action of the court to the Circuit Court of Appeals for the Eighth Circuit (Rec. V. 2, p. 569). The Circuit Court of Appeals reversed the lower court and dissolved the injunction. See *Guardian Trust Co.* v. *Kansas City Southern Ry. Co.*, 171 Fed. 43 (1909) (Rec. V. 2, p. 573).

This was the second attempt to enjoin the two state court suits based upon the Belt indebtedness. In August, 1905, the Southern Company had filed a bill to enjoin the prosecution of the suits, and obtained an injunction. The order granting the injunction was reversed by the Circuit Court of Appeals in May, 1906. See *Guardian Trust Co.* v. *Kansas City Southern Ry. Co.*, 146 Fed. 337 (C. C. A., 8th).

The issues raised by the foregoing bills and the answers thereto were referred to a Special Master, appointed by the court on November 7, 1900 (Rec. V. 2, p. 94). Between January, 1903, and October, 1904, over 8,000 pages of testimony were taken, all on behalf of the complainants. In December, 1904, the Trust Company unsuccessfully moved the Master to require the complainants to close their proofs. Subsequently, such a rule was granted, and the complainants were given until March 15, 1905, to complete their case, and the Trust Company from March 15, 1905, to April 15, 1905, to introduce its proofs. But March 15, 1905, came and went, and the complainants were still introducing evidence. The entire ledger account between the Trust Company and the Belt Company, and each

and every item thereof, over 6,000 in number, from the first day the companies transacted business together, in January, 1887, until the filing of the suit, a period of thirteen and a half years, were scrutinized and attacked.

In addition, the ledger accounts of the Trust Company with all the constituent and related companies were gone into, including every transaction with the Air Line, the Union Terminal, the Consolidated Terminal, the Central Improvement Company, the Elevator Company, the Second Street Company, the Amusement Company, the Northern Connecting Company, the Townsite Company, the Gulf Company and the Dock Company. The Trust Company was required to produce its vouchers, musty with age, covering every transaction shown on these accounts. Expert accountants were examined upon these papers, and testified for months at a time. The complainants were by an order of court given access to all of the books of the Trust Company, and for weeks they examined them. The Trust Company complained to the Master and to the court that the processes of the court were being abused in wasteful litigation, but the court declined to interfere. During the year 1905 almost daily hearings were had before the Master. In January, 1906, when the hearings closed, 36,000 pages of testimony had been taken (see Master's report, Rec. V. 2, p. 579). From 10,000 to 12,000 items of account had been scrutinized (Rec. V. 2, p. 580). The stenographer who took and transcribed the testimony was paid $25,000 for his services. The record of the hearing before the Master consisted of 58 volumes. The Master in his report, filed May 21, 1910, over four years after the hearings ceased, and nine and a half years after the case had been referred to him, consumed

nearly 400 printed pages in discussing and deciding the issues involved (Rec. V. 2, p. 575).

The Master's findings of fact were wholly in favor of the Trust Company. The suit had been grounded upon the proposition that the Belt and its subsidiary companies were so dominated and controlled by the Trust Company that their officers and directors were merely agents of the Trust Company, and that the companies were conceived, organized and manipulated by the Trust Company pursuant to a gigantic scheme to defraud investors in their securities. The Master found that there was no scheme to defraud; and that the companies were not organized, dominated, controlled or manipulated by the Trust Company. For thirteen independent reasons, "either appearing on the face of the bills, or practically undisputed in the proofs," the Master found the bills to be wholly without equity (Rec. V. 2, p. 647).

He found that at no time did the Trust Company own a majority, or even a substantial minority, of the stock of any of the companies; that the dealings of the Trust Company with the other companies were in all respects legitimate and proper; that there had been no overreaching or breach of duty on the part of the Trust Company; that its charges for services in marketing the securities of the other companies were not excessive; that its position as trustee in railroad mortgages did not disqualify it from handling those securities, or from receiving the same in pledge; that the transactions between the Trust Company and the other companies were open, a matter of record, and that the bookkeeping was full, complete and accurate as to all entries; that the accounts between the companies had been regularly stated and audited each month by formal certificates exchanged by their respective auditors, "and that the books tallied

to a cent" (Rec. V. 2, p. 648); that all the transactions attacked in the bills had at all times been known to the stockholders and bondholders of the respective companies, and had been expressly ratified by them without a single protest from any of them, and that "there was manifested, throughout many years, the most complete acquiescence in these transactions by the shareholders as a body."

As regards complainants' contentions that the Trust Company concealed the real nature of its dealings with the respective companies, in perpetration of the alleged scheme to defraud, the Master found as follows (Rec. V. 2, p. 671):

> "The record shows that all of those companies employed the voucher system of bookkeeping. The accounting between the companies appears to have been very accurate and correct, and all of the data and information, upon which the complainants predicate the right to an accounting, are shown on the books, both of the Belt Company and Trust Company. For every transaction that took place between those companies, a voucher advising as to the details of such transaction, was given by the Trust Company to the railroad company at the time, with the fullest details. The authority for every entry by the railroad company was in the shape of a letter from an executive officer, attached to a voucher, made up in the railroad company's office. If the Trust Company paid a bill, or a series of bills, for or on account of the railroad companies, the original bill, bearing the receipt of the party who got the money, passed to the railroad company's office and was there fastened to a formal voucher. All the transactions in the record are supported by a voucher, either cash or journal, and, in respect to the journal entries, in cases where the railroad company charged some account of its own, that voucher

was made up with unusual fullness, and spread at large upon the books of the railroad company. From the testimony of all the expert accountants for the complainants and defendants, the Master is convinced that, instead of there being any concealment on the part of either the Belt or the Trust Company, the entries made by both were unusually full of detail, for book entries, and were such as would either reasonably explain the transactions to others or put them on inquiry to find out what was meant by the entries, and from which it would seem, then, that the charge of concealed fraud could not be sustained by the proofs."

The Master further found that all of the transactions complained of occurred long prior to the accrual of the complainants' alleged cause of action; that no attempt was made to excuse the long delay in seeking an accounting; that the transactions attacked were closed, executed and completed transactions, consummated years before the original bill was filed, and that substantially all of the claims set forth in the bills had been barred by the five and ten-year statutes of limitation.

The Master found that the Belt Company was indebted to the Trust Company in the sum of $639,658.86; that the huge claims made by the complainants against the Trust Company and in favor of the Belt Company were unfounded; that the Trust Company was entitled to retain the securities pledged to it by the Belt Company, as against the Southern Company's contention that they passed to it under the after acquired property clauses of the Belt mortgages; but that the Southern Company was entitled to an order and decree requiring the Central Company and its receiver to convey to the Southern Company the real estate standing in the name of the Central Company, it having been purchased, according

to the finding of the Master, with funds furnished by the Belt Company.

The Master, as to the contention of the Trust Company that the Southern Company was liable to it for the Belt Company indebtedness, found in favor of the Southern Company (Rec. V. 2, p. 812-872).

On June 17, 1910, the Trust Company filed exceptions to the Master's report (Rec. V. 2, p. 892). The Trust Company excepted to the finding that the Southern Company was entitled to a conveyance of the Central Improvement Company lands, but did not allege error in the finding that the Southern Company was not liable on the Belt indebtedness. As to this latter matter the exceptions stated:

> "The Master has in said report stated as follows: 'That the Southern Company is not in any way liable for the floating indebtedness of the Belt Company,' whereas the Master should have omitted reference to or recommendation concerning the question of the liability of the Southern for said floating indebtedness of the Belt."

Five reasons were then given why the liability of the Southern was not an issue in the case.

On the day upon which they were filed, the exceptions were by the court overruled; and on June 25, 1910, the court entered a final decree in accordance with the findings and recommendations in the Master's report. Judgment in favor of the Trust Company was rendered against the Belt Company in the sum of $639,658.86; the Southern Company was awarded the Central Improvement Company lands; and the Southern Company was adjudged not liable on the Belt indebtedness to the Trust Company (Rec. V. 2, p. 903).

On August 10, 1910, the Trust Company appealed from said order and decree to the Circuit Court of Appeals for the Eighth Circuit (Rec. V. 2, p. 920). The assignment of errors, however, made no complaint of that part of the judgment relieving the Southern Company from liability for the Belt indebtedness, except to assert that the court erred in including any finding as to that matter in the decree (Rec. V. 2, p. 916).

On May 21, 1911, the Trust Company's appeal came on for hearing in the Court of Appeals at St. Paul. Minority stockholders in the Trust Company, alarmed at the failure of the Trust Company to assign error to the finding and judgment of the lower court that the Southern Company was not liable for the Belt indebtedness, employed Mr. Mecartney of Chicago, a former counsel of the Trust Company, to be present at the argument. Touching the Southern Company, the only argument made by counsel for the Trust Company was that the liability of the Southern Company was not in issue in the suit, and that the lower court had no right to include in its decree any adjudication upon the liability or non-liability of the Southern Company.

On May 26, 1911, Edward A. Shedd, Charles B. Shedd and Robert H. Law, the minority stockholders represented by Mr. Mecartney, filed a petition in the Circuit Court of Appeals for leave to file additional briefs in support of the appeal of the Guardian Trust Company (Rec. V. 2, p. 590). On June 16, 1911, the court entered an order directing the Trust Company, the Southern Company and the Cambria Company to show cause why the prayer of said petition should not be granted (Rec. V. 2, p. 968). On June 21, 1911, the Trust Company filed its return to said order, resisting the application of the petitioners to file additional

briefs (Rec. V. 2, p. 970). The return states: "The question of the personal liability of the Kansas City Southern Railway Company for the debt of the Belt Company is not in issue and cannot be determined upon this appeal." Furthermore, counsel of the Trust Company appeared in person and contested the right of the stockholders to be heard (Rec. V. 2, p. 971).

Upon an announcement by the court that a tentative conclusion had been reached adverse to the Trust Company upon the issue presented in the return (Rec. V. 2, p. 978), counsel for the Trust Company asked and received leave to file additional briefs upon this question and upon the correctness of the Master's finding (Rec. V. 2, pp. 971-3). Later a revised brief was filed on behalf of the Trust Company, which failed, however, to ask for a decree against the Southern Company (Rec. V. 2, p. 974).

On February 19, 1912, the minority stockholders represented by Mr. Mecartney filed a second petition (Rec. V. 2, p. 973). It prayed the court for leave to make an additional assignment of error on behalf of the Trust Company and to file suggestions as to the final judgment, and "that in case this Court finds that the Southern Company is liable for the Belt Company's debts, a final judgment may be rendered here directing the lower court, upon the application of the Trust Company, to enter a decree against the Southern Company for the total amount of the decree formerly entered against the Belt Company, with interest and costs." This petition and the suggestions were allowed by the court to be filed, by order entered on that day.

Subsequently there was a complete reargument of the case before the court, counsel for the Trust Com-

pany still insisting that the liability of the Southern Company was not in issue.

On October 22, 1912, the Court of Appeals filed its first opinion, reversing the decree of the Circuit Court, and holding the Southern Company liable for the Belt debt. It did not however require the Southern Company to pay the debt of the Belt Company, except as a condition to its right to the Central Improvement Company lands and the collateral held by the Trust Company. *Central Improvement Co.* v. *Cambria Steel Co.*, 201 Fed. 811.

On December 21, 1921, the minority stockholders filed their third petition. (Rec. V. 2, p. 1006.) The petition prayed the court as follows:

> "That this court embody in its proposed order of reversal to be entered herein in pursuance of the opinion heretofore filed—
>
> A special finding to the effect that the said litigation commenced by said Cambria Steel Company, and prosecuted by the Kansas City Suburban Belt Railroad Company in the way of an ancillary bill filed in this cause, which issues were raised, and said suits instigated at the instance and request of and prosecuted in reality on behalf of the Kansas City Southern Railway Company, and the said intervening petition filed and prosecuted by said Southern Company were each and all instituted and prosecuted without good faith, and that said entire litigation has been trivial, wanton and oppressive.
>
> That thereupon:
>
> 1. This court direct the lower court upon entering the decree against the said Southern Company, as ordered by the opinion lately filed herein,
>
> (1) To reserve jurisdiction to inquire as to the amount of attorney's or solicitor's fees, stenogra-

pher's fees, expert accountant's fees, and such other expenses reasonably and necessarily incurred by said Guardian Trust Company in making its defenses to such bill and ancillary bill and intervening petition and in asserting its claims herein;

(2) That upon petition or suggestion as to the same being filed in said cause by the Trust Company and upon evidence taken by affidavits or otherwise as the court may direct, the said court make a finding as to the amount of such fees, costs and expenses;

(3) That it thereupon order the same to be taxed as costs in said cause and a further decree be entered against said Cambria Company and Southern Company for said amounts respectively, in favor of said Trust Company, and that it be awarded execution therefor—the said inquiry and taxation of costs not to delay the entry of the said principal decree, as heretofore directed by said opinion, and not to stay the collection of the same in any manner."

In January, 1913, the case was reargued in the Court of Appeals, and on December 2, 1913, the court filed its second opinion in the case. *Central Improvement Co.* v. *Cambria Steel Co.,* 210 Fed. 696.

In said opinion the Court of Appeals reaffirmed its former holding that the Southern Company was liable for the Belt debt, but went further and directed a judgment against the Southern Company for the amount of said indebtedness. The court further held that all the property of the Belt Company then in the possession of the Southern Company was "a trust fund in control of the court," and subject to seizure and sale, and that said property was "charged with a trust in favor of the Trust Company for its debts and costs, and that the

Southern Company now holds that property as trustee for the Trust Company."

Concerning the petition of the minority stockholders that costs as between solicitor and client be taxed against the Southern Company, the court said (210 Fed. 723):

> "A deliberate consideration of this petition and of the exhaustive arguments of counsel have, however, persuaded that inasmuch as the questions suggested came for the first time into this suit at the rehearing in this court, as no evidence has been taken relative to them, and as the evidence upon the issues tried in this case was not brought to this court, it would be unwise and might be unjust to adjudicate the questions presented by the petition of the stockholders. Moreover, as this court cannot rightly determine the questions relating to the costs to be taxed at this time, as there are established rules of practice concerning them, and as directions to the court below to open and try new issues might, and probably would, prolong this litigation through several years more, our conclusion is that our just course is to leave the taxation of costs to the court below under the principles, rules, and practice in equity."

In giving directions to the lower court concerning the terms of the decree to be entered, the opinion concluded (210 Fed. 724):

> "The decree should adjudge that the Trust Company may recover its costs down to the entry of the decree of the Cambria Company as well as of the Southern Company, and the court may apportion those costs between them, but not as against the Trust Company, which should be permitted to pursue either or both of them until its costs are paid. The District Court should reserve in the decree full

jurisdiction to render such further decrees and take such subsequent proceedings in the suit as equity and good conscience may require."

The Southern Company appealed from the decree to this court, which on February 21, 1916, affirmed the decision of the Court of Appeals. *Kansas City Southern Railway Co.* v. *Guardian Trust Company*, 240 U. S. 166, 36 S. Ct. 334. The opinion of the court deals wholly with the liability of the Southern for the Belt debt, and does not mention the matter of costs; and no reference is made to the stockholders' petition regarding attorneys' fees. The opinion is relatively brief, in view of the issues involved, and concludes: "The case has been so fully discussed below that we think it unnecessary to go into further detail." Chief Justice White and Mr. Justice Van Devanter were of the opinion that upon the findings of the Master, the decree should be reversed, and therefore dissented.

The mandate from this court to the District Court (Rec. V. 1, p. 465), filed April 18, 1916, recited in full the decree of the Court of Appeals, entered December 2, 1913, as follows:

> "These causes came on to be heard on the transcript of the record from the Circuit Court of the United States for the Western District of Missouri, and were argued by counsel.
>
> On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said Circuit Court, in these causes be, and the same is hereby, reversed with costs; and that the Central Improvement Company, H. H. Crittenden, Receiver of Central Improvement Company, in case No. 3489, and the Guardian Trust Company in No. 3490, have and recover against the Cambria

Steel Company, The Kansas City Suburban Belt Railroad Company, Edward F. Swinney, as Receiver of the Kansas City Suburban Belt Railroad Company, and The Kansas City Southern Railway Company, their costs in this behalf expended in the respective cases to be taxed by the Clerk of this Court.

It is further ordered that these causes be, and the same are hereby remanded to the District Court of the United States for the Western District of Missouri, as the successor of the Circuit Court for said District, with directions to render a decree for the Trust Company in accordance with the views expressed in the opinion of this Court," * * *.

The mandate concluded:

"On Consideration Whereof, it is now ordered, adjudged and decreed by this Court that the decree of the said United States Circuit Court of Appeals in this cause be, and the same is hereby, affirmed with costs; and that the said Guardian Trust Company, Central Improvement Company, Cambria Steel Company and Kansas City Suburban Belt Railroad Company recover against the said The Kansas City Southern Railway Company, Twenty Dollars for their costs herein expended and have execution therefor.

And It is Further Ordered, that this cause be, and the same is hereby, remanded to the District Court of the United States for the Western District of Missouri.

You, therefore, are hereby commanded that such execution and proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable Edward D. White, Chief Justice of the United States, the thirteenth day of

April, in the year of our Lord one thousand Nine hundred and Sixteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Costs of Guardian Trust Co. *et al.*

Clerk	Paid
Printing Record	
Attorney	$20.00
	$20.00"

On April 15, 1916, the Southern Company paid the Trust Company $821,623.28, said sum being agreed upon as an approximation of the amount due on the judgment, and being subject to check and correction thereafter. (Rec. V. 1, p. 129.) The Trust Company gave its receipt for the amount paid, said receipt expressly stipulating, and all parties understanding and acknowledging, that the payment and receipt of said amount should not affect the Trust Company's right to recover costs and attorneys' fees. On final hearing it was determined that the amount paid was in excess of the amount due, by the sum of $6,765.54, and that difference was adjusted between the parties. (Rec. V. 1, p. 130.)

On October 4, 1922, the Trust Company moved the District Court to enter a final decree in the cause pursuant to the decree and opinion of the Court of Appeals and the mandate of this Court. (Rec. V. 1, p. 16.) The Trust Company contended that it was entitled to have the court ascertain solicitor and client costs, and to have them taxed against the complainants.

On June 20, 1923, the District Court filed its memorandum opinion upon the issues raised by said motion.

(Rec. V. 1, p. 691.) The court prefaced its discussion with the following analysis (Rec. V. 1, p. 693):

> "The right to tax costs as between solicitor and client depends upon one, or both, of two theories recognized in the law.
>
> First. Where gross charges of fraud and misconduct have been made and not sustained, and where the main ground of the suit is shown to be false, unjust, vexatious, wanton or oppressive. In other words, where charges amounting to scandal and a misuse of the court are made and not sustained, but found to be baseless and unwarrantable.
>
> Second. Where a fiduciary relation exists between the parties, such as trustee and *cestui que trust*, or pledgor and pledgee, or principal and agent, and where the fiduciary is put to expense in the defense of an unfounded suit brought against him by such *cestui que trust*, or pledgor or principal, especially where charges of gross fraud and misconduct have been made against a fiduciary and have been found baseless and unwarrantable."

The court considered that in view of the findings of the Circuit Court of Appeals, the present case fell within both of the above classifications, and that the Trust Company was therefore entitled to solicitor and client costs. On June 25, 1923, the court appointed a Special Master to ascertain, take and state an itemized account of all costs and expenses paid or incurred by the Trust Company in its resistance of and defense against this litigation, including among other expenses, those for attorneys' fees, stenographers' fees, and expert accountants' fees. (Rec. V. 1, p. 19.)

The Trust Company, pursuant to the order of the court appointing the Special Master, filed with the Special Master its claim for costs as between solicitor and client,

over and above the ordinary party and party costs, in the sum of $319,829.97, all of which had been paid and incurred by the Trust Company in the progress of the cause. (Rec. V. 1, p. 91.) Of this amount, $299,137.30 had been expended in payment of attorneys' fees. The Master, in his report, filed September 15, 1924, found and allowed as costs as between solicitor and client, the sum of $296,520.37. (Rec. V. 1, p. 46, 59.) The Trust Company, and the Southern and Cambria Companies (the latter jointly) filed exceptions to the Master's report. (Rec. V. 1, pp. 94, 106.)

On March 23, 1926, the court filed its memorandum opinion on the issues raised by the exceptions. (Rec. V. 1, p. 704.) The court had, upon reflection, changed the views expressed by it in its former opinion. The court, after a discussion of authorities, came to the following conclusion (Rec. V. 1, p. 714):

> "One cannot escape the conclusion, whatever he may think the law ought to be, that under the statutes of the United States, and the policy announced by its courts from highest to lowest, costs as between solicitor and client cannot be taxed against the losing party, however unjust and expensive the litigation, in the absence of the existence of a fiduciary relation, with the necessary incidents which create an exception of this rule, and that, in this respect, the practice which may prevail in the Chancery Courts of England can have no controlling effect."

It then determined that the necessary fiduciary relationship did not exist in this case, because the Trust Company was defending its own interests in the litigation. (Rec. V. 1, p. 716.) The court therefore held that the exceptions of the Trust Company to the Master's

report, going to the power of the court to tax costs as between solicitor and client, should be sustained. (Rec. V. 1, p. 717.) On May 15, 1926, the court entered a final decree in the cause, taxing in favor of the Trust Company only party and party costs. (Rec. V. 1, p. 128.) This decree, reciting the payment of the judgment by the Southern Company, directed the Trust Company to deliver forthwith to the Southern Company all the collateral security pledged by the Belt Company to secure its indebtedness.

On June 18, 1926, the Trust Company duly appealed from said decree to the United States Circuit Court of Appeals. (Rec. V. 1, p. 132.) On May 18, 1928, said court reversed the decree of the District Court. (Rec. V. 1, p. 749.) The opinion of the court fully upholds the right of the Trust Company to costs as between solicitor and client, and the power of the court to award such costs under the circumstances. (Rec. V. 1, pp. 722-749.) *Guardian Trust Co.* v. *Kansas City Southern Railway Co.*, 28 Fed. (2d) 233. The court directed the following disposition of the case (Rec. V. 1, p. 748):

> "In view of the state of the record, the case must be sent back to the trial court to make the proper allowances for costs 'as between solicitor and client'. The special master's report has been made. Numerous exceptions have been filed thereto by both parties. Doubtless these will have to be passed upon. We see no necessity for the taking of further testimony. The amounts to be allowed are not controlled by what the Trust Company actually expended, and may vary widely therefrom. The allowances should be such as, in view of the facts and circumstances proved in this case which authorize them, will be reasonable and just.

The decree is reversed with instructions for further proceedings in accordance with the views herein expressed."

The case was brought here on certiorari, allowed February 25, 1929. (Rec. V. 1, p. 825.)

ARGUMENT.

I.

The sole issue is the power of the District Court.

The issue before this Court, and the only issue, according to our analysis, is the *power* of the District Court under the circumstances of this case, to reimburse the Trust Company for any of the items covered by its claim for solicitor and client costs.

The District Court properly adopted, and considered itself bound by, the findings of the Court of Appeals. It said (Rec. V. 1, p. 703):

> "This court is passing no new and independent judgment upon the issues already litigated. The Circuit Court of Appeals, as it says, practically tried the case *de novo*, and made distinct findings. This court adopts those findings and bases its action upon them, and them alone. * * * To do otherwise * * * would be to disregard the decision of the Circuit Court of Appeals to a degree amounting practically to contumacy."

The pertinent findings of the Court of Appeals, which the District Court, in its first opinion, thought sufficient to entitle the Trust Company to solicitor and client costs, are commented on by the Court as follows (Rec. V. 1, pp. 698, 699):

> "There is no escape from the conclusion that the Circuit Court of Appeals was of opinion, and in substance so found, that a plan was formed by the then guiding and controlling powers of the Southern Company to despoil the Trust Company of its property. * * * So that, the responsibility of the

> Southern Company is judicially fixed for the initiation of all this successive litigation against the Trust Company, and the objects of that litigation are also clearly defined. The Court then finds that the Cambria suit, so inspired by the Southern Company, was wholly baseless and unwarranted."

In its second opinion, also, the District Court considered itself bound by the findings of the Circuit Court of Appeals, and conceived that those findings conclusively established the nature of the suit, its purpose, and the responsibility of the Southern Company therefor, the only question being the interpretation of the language (in the opinion of the Court of Appeals) "under the principles, rules and practice in equity." (Rec. V. 1, 705.)

The court sustained the exceptions of the Southern Company to the Master's report, because "one cannot escape the conclusion, whatever he may think the law ought to be, that under the statutes of the United States, and the policy announced by its courts from highest to lowest, costs as between solicitor and client cannot be taxed against the losing party, however unjust and expensive the litigation." (Rec. V. 1, p. 714.)

The Southern Company's brief in this Court in support of its petition for certiorari states (p. 15): "The court reversed its former ruling, and held that the law did not permit the taxation of costs as between solicitor and client."

The lower court, therefore, considered it judicially established that this suit was wholly baseless and unwarranted, and that it was brought and fostered by the Southern Company in pursuance of a fraudulent plan and design to despoil the Trust Company of its property. Evidently, therefore, in the opinion of the District Court, all the equities were in favor of the Trust

Company. It was entitled to be reimbursed for its costs and expenses if the court had power to compel reimbursement. But the court considered that no such power existed.

Costs in equity are discretionary. But this is not a case where a court, considering it has power to award costs in its discretion, and in view of the equities denies them. On the contrary, the equities of the case called for the award. Costs were denied because of a presumed lack of power to grant them.

Under such circumstances, if the power actually existed, the lower court should be directed to make the award.

Seibert v. *Minneapolis & St. L. Ry. Co.*, 58 Minn. 58, 57 N. W. 1068 (1894).

The Circuit Court of Appeals has decided that such power does exist. In three separate opinions [201 Fed. 811, 210 Fed. 696, 28 Fed. (2d) 233], it has found and conclusively established the facts which entitle the Trust Company to such costs if the court may award them. If this Court be of the opinion that the District Court, in view of the character of the litigation, the relationship of the parties, and the facts as found by the Circuit Court of Appeals, could properly have decreed reimbursement as to any of the items covered by the Trust Company's claim, the decision of the Court of Appeals should be affirmed, and the District Court should be directed to hear and determine the exceptions to the Master's report going to the particular items claimed as taxable costs, and to award those items found properly taxable.

II.

Reimbursement always awarded to pledgee for defense of pledgor's title.

Solicitor and client costs are properly taxable under various circumstances, shortly to be discussed. However, upon one ground, we believe that the right of the Trust Company to be reimbursed for its attorneys' fees and expenses paid and incurred in this litigation, and the power of the District Court to effect such reimbursement, are so thoroughly recognized and established that no appeal should be necessary to the principles justifying the imposition of such costs under other circumstances.

The Belt Company became indebted to the Trust Company, and pledged with the Trust Company certain collateral, to secure that indebtedness. The Southern Company attacked the validity of the pledge, alleging that the collateral passed to it under the after acquired property clause of the Belt mortgage. The Southern Company sought, by this litigation, to recover the pledged collateral. The Trust Company is entitled to reimbursement for the costs and expenses incurred by it in defense of this litigation.

A pledge is a bailment for the mutual benefit of the parties. The pledgee, in holding, preserving and realizing upon the security is acting for the pledgor as well as in his own interest. Because of this fact, the pledgee is entitled to reimbursement for costs and expenses, including attorneys' fees, reasonably paid or incurred in preserving the collateral and subjecting it to the payment of the debt, even though such reimbursement is not expressly stipulated for. *Gregory* v. *Pike*, 67 Fed. 837, 15 C. C. A. 33 (1895); *Fagan* v. *Thompson*, 38 Fed. 467 (1889); *Ballingale* v. *Hunsberger*, 16 Pa. Super. Ct. 117 (1901).

The pledgee is under an actual duty to preserve the security, using due diligence to that end; and if a third person asserting his own title or right to possession, seeks by legal proceedings to recover the security from the pledgee, the latter is authorized and empowered to defend such suit or suits, to add the cost of such defense to the original debt, and, in case he prevails over the third party, to hold the collateral as security for the repayment of such cost as well as for the payment of the original indebtedness.

Fagan v. *Thompson*, 38 Fed. 467 (1889).
Planters Rice Mill Co. v. *Merchants National Bank*, 78 Ga. 574, 3 S. E. 327 (1887).
Furness v. *Union National Bank*, 147 Ill. 570, 35 N. E. 624 (1893).
Ely-Walker Dry Goods Co. v. *Colbert*, 124 S. W. 705 (Tex. Civ. App.) (1910).
Parker v. *Watkins*, Johnson's Reports 133 (1858).
Sandon v. *Hooper*, 6 Beav. 246 (1843).
Godfrey v. *Watson*, 3 Atk. 517 (1747).
Halsbury, Laws of England, V. 21, p. 238.
Jones, Collateral Securities, 3d Ed., Sec. 400.
Beames, Costs in Equity (2d Ed.) (1840), p. 24.
Daniell's Chancery Practice (1st Ed.) (1837), V. 3, p. 14.

In 31 Cyc. 826, the rule is stated as follows:

"The pledgee has a lien on the property for any expenses, including the attorneys' fees, reasonably incurred by him in keeping and caring for the property pledged, protecting it against liens, taxes and assessments, or otherwise protecting the pledgor's rights, in making sale for the enforcement of the pledge, in collecting choses in action, and other expenses incurred in rendering the pledged property available for the payment of his debt."

The pledgee, in defending the pledgor's title, is really acting as agent of the pledgor. It is well settled that an agent is entitled to be reimbursed for attorneys' fees incurred in defending suits brought against him by reason of acts done in the performance of his duties.

Whitehead v. *Darling*, 5 S. W. 356 (Ky.) (1887).
First National Bank v. *Tenney*, 43 Ill. App. 544 (1891).
Selz, Schwab & Co. v. *Guthman*, 62 Ill. App. 624 (1895).
In re Famatina Development Corporation, Ltd., L. R. (1914) 2 Ch. D. 271.
Williams v. *Lister & Co.*, 109 L. T. R. 699 (1913).
In re Wells & Croft, 15 Reports 169 (1894).
Adamson v. *Jarvis*, 4 Bingham 66 (1827).

The Southern Company had no standing as an intervener, and no interest in the controversy (otherwise than through its representatives and dummies), except upon its claim of title to the pledged assets. Its allegation of ownership free from the pledge constituted a direct attack upon the lien and possession of the Trust Company and a denial of the right of the Belt Company to pledge the collaterals as it had pledged them. And the Trust Company, in defending, was defending the interest of the pledgor as well as its own interest. The Southern Company alleged that it owned the securities and that the Trust Company was indebted to it for taking and retaining them. If so, this must have been for the reason that the Belt Company had no sufficient title to sustain the pledge.

This brings the case squarely within the foregoing authorities, and we can conceive of no reason why the

unquestioned rule established by them should not apply, regardless of the charges of fraud, and of the good or bad faith of the litigation, and of the other relationships of the parties.

It should be noted that the petition of the Southern Company was a petition for the recovery of certain specific items of property pledged to the Trust Company, or the proceeds thereof, on the ground that they belonged to the Southern Company. Its prayer was that the court require the conveyance to the Southern Company of all the real estate and other property standing in the name of the Central Improvement Company; that the Trust Company be required to assign to the Southern Company the account of the Belt Company against the Gulf Company, and to assign to the Southern Company the capital stock of the Northern Townsite Company; that the Trust Company be required to account for and pay over the proceeds of various other assets. (Rec. V. II, p. 185.) The prayer of the amended intervening petition is the same. (Rec. V. II, p. 291.)

All of these properties and assets, or stock representing them, were held by the Trust Company as pledgee of the Belt Company, and were alleged in the petition to belong to the Southern Company. It was an unquestioned attack upon the title of the pledgor. Counsel for the Southern Company, in their last brief thus state the issues under this intervening petition (p. 11):

> "First, was the petitioner the owner of the collateral security, or the properties represented thereby? Secondly, did the Trust Company assume a relation of trust with respect to the use of the proceeds of the Union Terminal bonds; and if so, was that trust violated? Thirdly, did petitioner assume the debt of the Belt Company?"

It stands admitted, therefore, as it must be admitted, that this petition constituted an adverse claim to the pledged property. Under such circumstances, the Trust Company was not only warranted in defending the pledge, but bound to do so, and it was entitled to its outlays in so doing. It is admitted also, that the petition charged the Trust Company, as trustee under the Union Terminal mortgage, with violation of its trust, a charge which will be considered later. The third issue, as to the liability of the Southern Company was, of course, not tendered by the petition.

The fact that the Southern Company at this time owned substantially all the stock and bonds of the Belt Company, is immaterial in this connection. Its petition was not filed as such owner, but as the purchaser of the pledged securities. Even though the attack upon the validity of the pledge be made by the pledgor, the pledgee is entitled to defend, and to be reimbursed for the costs thereof, in the same manner.

Hurst v. *Coley*, 22 Fed. 183 (1884).
Bay Biscayne Co. v. *Baile*, 73 Fla. 1120, 75 So. 860 (1917).
In re Baldwin's Estate, (1900) 1 Irish L. R. 15.
Halsbury, Laws of England, V. 21, p. 238.

If the Trust Company was entitled to reimbursement for its costs and expenses, as the foregoing authorities hold, the District Court had power to make provision therefor in its final decree of May 15, 1926. That decree, reciting the payment by the Southern of the Belt indebtedness, directed the Trust Company to deliver to the Southern Company the security pledged with it by the Belt Company. The court could and properly should have made the order for the delivery of the securities

conditional upon the payment by the Southern Company of the amount expended by the Trust Company in defending the litigation.

Conditional relief of this character has often been granted. See *Newton* v. *Consolidated Gas Co.*, 265 U. S. 78, 44 S. Ct. 481 (1923); *Page* v. *Rogers*, 211 U. S. 575, 29 S. Ct. 159 (1909); *Meyers* v. *Block*, 120 U. S. 206 (1886).

The power to impose conditions with reference to the granting of injunctions, was commented on by this Court, in *Russell* v. *Farley*, 105 U. S. 433, 437 (1881), as follows:

> "The court, in the exercise of its discretion, frequently resorts to the expedient of imposing terms and conditions upon the party at whose instance it proposes to act. The power to impose such conditions is founded upon, and arises from the discretion which the court has in such cases, to grant, or not to grant, the injunction applied for. It is a power inherent in the court as a court of equity, and has been exercised from time immemorial."

Relief was conditioned upon the payment of costs in *Dewey* v. *Stratton*, 114 Fed. 179, 52 C. C. A. 135 (1902).

It was held in *Atlantic Trust Co.* v. *Chapman*, 208 U. S. 360, 28 S. Ct. 406 (1908), that the appointment of a receiver could be conditioned upon the assumption of liability by the plaintiff for the expense of the receivership, in case the assets proved insufficient to meet them.

The court considered that it had no power to make the order for the delivery of the collateral conditional upon the payment of the Trust Company's costs and expenses. Not only did it have such power, but the equities of the case demanded that such a condition be

imposed. Should a pledgee be required by a court of equity to return the pledged property unimpaired to the pledgor, after being forced to expend more than the face of his debt in preventing a third party or the pledgor himself from unlawfully and wrongfully taking the security from him? The fact that the indebtedness was ultimately paid in full by the Southern Company is immaterial. It was not paid until the Trust Company's expenses in defending the unwarranted litigation had been incurred. The lower court did not do equity in decreeing the payment of the debt and the return of the collateral without allowing the Trust Company reimbursement for its proper expenses in preserving the pledge.

This alone should warrant an affirmance of the judgment of the Circuit Court of Appeals.

III.

Before we enter upon a discussion of the various circumstances, under which solicitor and client costs are properly taxable, let us consider two preliminary contentions made by the Southern Company.

(a) The effect of the mandate.

It is first urged that whatever the law may be with respect to the taxation of costs as between solicitor and client, such costs cannot be taxed in this case, because the proper execution of the mandate of this Court on the former appeal required the taxation of costs only as between party and party.

The mandate affirmed, "with costs," the decree of the Circuit Court of Appeals, and directed that the Trust Company have and recover $20 for its costs "herein" expended. "Herein" evidently means "in the Supreme

Court" and the $20 allowed is the docket fee, or attorney's fee, provided by law in all cases. It in no way applies to or affects the costs *below*, which were covered by the decree of the Circuit Court of Appeals, expressly affirmed by the mandate.

The Southern Company in its brief in support of its application for certiorari, cites many authorities to the effect that "costs," as used in the mandate, means ordinary taxable costs, that is, party and party costs.

We concede the soundness of the authorities cited, under the circumstances to which they apply. But how do they help the case of the Southern Company? This Court awarded the Trust Company party and party costs in this Court. But it also affirmed the decree of the Circuit Court of Appeals, which sent the case back to the District Court for a proper determination and taxation of costs according to the rules and practice in equity. The Supreme Court made no determination whatever as to solicitor and client costs. The right to such costs was not before the court except as involved in that decree. It was not mentioned in the assignments of error. It was not touched upon in brief or argument. Neither in the opinion nor the mandate of this Court is there any reference to solicitor and client costs. Furthermore, the claim for such costs had not yet been filed; the question had only been saved for the District Court. Is it not, under such circumstances, rather extraordinary to say that this Court considered, passed upon and denied the claim?

The mandate is, of course, controlling as to the matters regulated by it. But the lower court can pass upon any point undisposed of by the mandate. *Ex parte Union Steamboat Co.*, 178 U. S. 317, 20 S. Ct. 904 (1900); *In re Sanford Fork and Tool Co.*, 160 U. S. 247, 16

S. Ct. 291 (1895); *United States* v. *Pan-American Petroleum Co.*, 24 Fed. (2d) 206 (1927). The mandate of this Court was silent as to solicitor and client costs. If a mandate makes no provision for costs, their taxation is left to the discretion of the lower court. *Murphy* v. *Loos*, 32 Ill. App. 595 (1889); *Brueggemann* v. *Young*, 128 Ill. App. 200 (1906).

The filing of the mandate in the lower court did not terminate the jurisdiction of that court. It still had power to entertain any proper proceedings, not in conflict with the directions of the mandate. *Baltimore Building and Loan Association* v. *Alderson*, 99 Fed. 489, 39 C. C. A. 609 (1900); *St. Louis & San Francisco R. Co.* v. *Barker*, 210 Fed. 902 (1914); *Clark* v. *Chicago, M. & St. P. Ry. Co.*, 105 Fed. 552 (1900); *Sizer* v. *Many*, 16 How. 98 (1853). And costs, on any such subsequent proceedings, may be taxed by the court, in its discretion, even though the mandate contained a direction as to costs. *Mills* v. *Lehigh Valley R. Co.*, 226 Fed. 812 (1915); *Title Insurance Co.* v. *California Development Co.*, 179 Cal. 734, 178 Pac. 857 (1919); *House* v. *Amsdell Brewing and Malting Co.*, 117 N. Y. S. 796, 133 App. Div. 486 (1909).

Some misapprehension is possible of the meaning of the decision in *Kell* v. *Trenchard*, 146 Fed. 245, discussed and quoted on page 21 of the Southern brief in support of the application for certiorari. The court in that case did not decide that after a mandate had gone down directing an equal division of "costs," there could be no allowance made to the receiver. The decision is merely that the allowance to the receiver (apparently made after the receipt of the mandate) did not have to be apportioned between the parties under the order directing costs to be apportioned, and should have been paid out of the fund in the receiver's hands.

If the allowance to the receiver was made after the receipt of the mandate (as it apparently was, though there is no definite statement to that effect), the case is in direct conflict with the Southern Company's contention as to the effect of the mandate in the present case.

The Southern Company's argument fails to take into account the decision of the Circuit Court of Appeals. This Court did not simply reverse a decree of the District Court. It affirmed a decree of the Court of Appeals. That decree reversed "with costs," the District Court decree, and remanded the case "with directions to render a decree for the Trust Company in accordance with the views expressed in the opinion of this Court." (Rec. V. 1, p. 466.) Such a direction had the effect of making the opinion a part of the decree. *Gulf Refining Co.* v. *United States*, 269 U. S. 125, 46 S. Ct. 52 (1925). A mandate or decree may be construed in the light of the opinion, even though there be no such direction. *Ex parte Union Steamboat Co.*, 178 U. S. 317, 20 S. Ct. 904 (1900); *In re Sanford Fork and Tool Co.*, 160 U. S. 247, 16 S. Ct. 291 (1895); *West* v. *Brashear*, 14 Pet. 51 (1840).

The opinion in the Court of Appeals discussed the stockholders' petition for a finding that the litigation was instituted in bad faith, and for a direction to the lower court to find and allow in favor of the Trust Company attorneys' fees and the other expenses mentioned. The court concluded that since the evidence below was not before the court, and since no evidence had been taken relative to the amount of attorneys' fees and expenses which had been paid and incurred, the taxation of such costs should be left to the lower court under the principles, rules and practice in equity. (210 Fed. 723.)

In our opinion this amounted to a direction to the

lower court to tax these costs according to equity practice, and did not authorize the court to pass upon the question whether such costs were properly taxable. But whether this be the proper interpretation or not, certain it is that the decree and opinion of the Court of Appeals authorized and empowered the District Court to award solicitor and client costs. And it was this decree which the Supreme Court affirmed.

The mandate of this Court reads: "It is now ordered, adjudged and decreed by this Court that the decree of the said United States Circuit Court of Appeals in this cause be and the same is hereby affirmed." And the mandate directs such further proceedings in the cause as according to right and justice, and the laws of the United States, ought to be had, "the said appeal notwithstanding." "The said appeal" is the appeal of the Southern Company from the decision of the Court of Appeals. The mandate means, therefore, that the District Court should proceed as though no appeal had been taken from the decree of the Court of Appeals. *Hawkins* v. *Cleveland, C. C. & St. L. R. Co.*, 99 Fed. 322, 39 C. C. A. 538 (1900); *The Sydney*, 47 Fed. 260 (1891).

In the latter case, the court said with respect to such a situation: "The mandate merely informs the court that the appeal is no longer pending, and directs the court to proceed as it should do in view of that fact." If no such appeal had been taken in the instant case, certainly the District Court would have had power to tax such solicitor and client costs as are properly taxable in equity.

The case of *United States* v. *Pan-American Petroleum Co.*, 24 Fed. (2d) 206 (1927), is a direct authority to

the effect that the mandate in the present case should be considered in conjunction with the opinion of the Court of Appeals: The court in that case said:

> "There is no express order or direction in the mandate for the payment or allowance of any interest to any of the parties to the suit. Neither is this Court prohibited by it from allowing interest herein. Its text leaves the question of interest open and unsettled. But it does require us to examine the opinion of the Circuit Court of Appeals and to proceed in accordance with such opinion, and the law is that in such cases the direction to proceed consistently with the opinions of the appellate courts has the effect of making such opinions a part of the mandate as though at length set out therein. See *Gulf Refining Co.* v. *U. S.*, 269 U. S. 125, 135, 46 S. Ct. 52, 70 L. Ed. 195."

The court then considered the opinion of the Circuit Court of Appeals, construed it as evidencing the Government's right to interest, and thereupon compelled the defendants to pay interest. Here the mandate of the Supreme Court was interpreted in connection with the opinion of the Circuit Court of Appeals under circumstances precisely the same as those existing in the present case.

The case of *Missouri Pacific Ry. Co.* v. *Larabee*, 234 U. S. 459, 34 S. Ct. 979 (1913), disposes conclusively of the contention that the allowance of twenty dollars attorneys' fees in the mandate precludes a further allowance. In that case, the Larabee Flour Mills Company brought mandamus in the Supreme Court of Kansas to compel the Railway Company to continue certain switching service. A peremptory writ issued. A Kansas statute allowed attorneys' fees to the successful plaintiff in a mandamus proceeding. Pursuant to this

statute, the plaintiff filed a claim for damages and attorneys' fees. In the meantime, a writ of error issued from the Supreme Court of the United States to the Kansas Court, to review the judgment granting the writ of mandamus. The judgment was affirmed (211 U. S. 612, 29 S. Ct. 214), and a mandate went down to that effect. The mandate (as in the present case) gave the plaintiff its costs, including an attorneys' fee of $20.00. Thereafter, the plaintiff filed an amended claim for damages and attorneys' fees and included therein a claim for fees incurred in the United States Supreme Court. The Railway Company resisted the claim, one objection being that the mandate, in awarding an attorneys' fee of $20.00, precluded any further allowance of such fees. The Kansas Court allowed fees, covering services in both the state court and this Court. This Court, on writ of error, held the allowance improper in so far as it concerned services in this Court, since a state statute cannot competently provide for fees or allowances in the United States Supreme Court; but the court affirmed the award in so far as it covered services in the state court. In affirming the state court award, this Court necessarily held that the provision in the earlier mandate, taxing as costs an attorneys' fee of $20.00, did not preclude a subsequent and additional award of attorneys' fees in the lower court.

(b) The Act of February 26, 1853.

The second contention is that the Act of February 26, 1853, controls the present controversy, and that therefore no attorneys' fees can be taxed or allowed in this case in excess of $20.00. To sustain this proposition, the South-

ern Company, in its brief in support of the application for certiorari, cities the following cases:

The Baltimore, 8 Wall. 377.
Oelrichs v. *Williams,* 15 Wall. 211.
Tullock v. *Mulvane,* 184 U. S. 497.
Missouri, K. & T. R. Co. v. *Elliott,* 184 U. S. 530.
Missouri P. R. Co. v. *Larabee,* 234 U. S. 459.
McIntosh v. *Ward,* 159 Fed. 66.
Fraser v. *Cole,* 214 Fed. 556.
Leary v. *United States,* 257 Fed. 246.
Motion Picture Patents Co. v. *Steiner,* 201 Fed. 63.

None of the foregoing cases are in point. The nearest is perhaps *The Baltimore,* 8 Wall. 377, and its force is detracted from by several circumstances. The case is an admiralty, not an equity, case. Furthermore, the opinion contains no discussion of the circumstances under which the suit was brought. The attorneys' fee claimed might very properly have been denied, even though the court recognized its discretionary power to grant it. Again, no adequate consideration by the court is given to the meaning of the Act of 1853. Without any discussion, the court merely states that fees and costs are now regulated by the Act.

Oelrichs v. *Williams,* 15 Wall. 211, is relied upon as completely dispelling any lingering doubt as to the meaning of the Act. But the statute is mentioned at no point in the opinion of the court. Indeed, the case involves no question whatsoever, as to the taxing of costs. The action is on an injunction bond. The decision is merely that attorneys' fees, incurred in defending an injunction suit, are not a proper element of *damages* in a suit on the bond. The question is one of interpretation of the

language of the bond, nothing more. It is now, and always has been, perfectly well settled in the Federal Courts (although the prevailing state rule is to the contrary), that attorneys' fees are not a proper element of damages in suits on injunction bonds. But we see no basis for urging that this rule is grounded upon the fee bill of 1853.

Tullock v. *Mulvane,* 184 U. S. 497 and *Missouri, K. & T. R. Co.* v. *Elliott,* 184 U. S. 530, are in the same category. Both are actions on injunction bonds given in the Federal Court. Both are actions at law. In neither is there any mention of the Act of 1853. Indeed, in *Tullock* v. *Mulvane,* in connection with a contention that no federal question is involved in the case, the court takes note of the fact that there is no federal statute regulating injunction bonds in federal court proceedings.

Missouri Pacific Ry. Co. v. *Larabee,* 234 U. S. 459, is even further removed from the issue. This is the case, mentioned above in another connection, where the Supreme Court of Kansas sought to allow attorneys' fees for services in the Supreme Court of the United States, under a state statute giving the successful plaintiff in a mandamus proceeding the right to attorneys' fees. The case held that the state statute could not regulate the practice in this court. The Southern Company, in its brief, states that in this case "the prior interpretation of the Act of 1853 is reaffirmed." But the opinion at no point mentions the Act of 1853.

Furthermore, the action is one at law. All the cases cited by the court (with the exception of *Oelrichs* v. *Williams, supra*) were law actions. There is no discussion of any kind with reference to the power of a court of equity over costs. The sole question in the case is the validity of the Kansas statute in so far

as it applied to the proceedings in this court. This is the express statement of the court, made in framing the issue to be decided:

> "The court placed its action in making the allowances in question, not upon the supposed authority of any act of Congress, nor of any practice of this court or rule thereof sustaining the same, nor upon any principle of general law, but solely upon the theory that a state statute gave the power to make the allowances."

McIntosh v. *Ward*, 159 Fed. 66, is not so obviously beside the point as the cases last mentioned, but we deem it to be no authority for the Southern Company's contention. In the quotation from the opinion of the court, set out in the Southern's brief, certain very pertinent observations are carefully omitted. For example: "And in *Trustee* v. *Greenough*, 105 U. S. 527, it was said that costs as between party and party are confined to the matters allowed by the fee-bill act." The Southern Company cites the case as authority for the proposition that the Act of 1853 controls the allowance of solicitor and client costs; and yet the court cites and discusses, with apparent approval, a controlling decision of the Supreme Court to the effect that the Act governs only party and party costs. The court comments fully upon the broad discretion vested in the chancellor respecting the allowance and apportionment of costs in equity cases; upon the fact that allowances may be made from a fund for services and expenses in conserving and administering the fund; and upon the power, in certain cases, to impose those costs for services and expenses upon the party personally, where the fund proves insufficient to pay them. Pretty clearly, the court does not consider itself

foreclosed as to such matters by the Act of 1853. The case seems to hold, merely, that the circumstances were not such as to justify, on equitable principles, an imposition of the allowances in question upon the defeated party.

In substance, the action was one at law, brought by one partner against the other, for money due. Furthermore, as we read the facts, no question of the allowance of attorneys' fees was involved, but, rather, a sum of $2,000, borrowed by the receiver to pay labor bills, and a sum of $13,005.81, which the receiver took from the assets of the firm as and for his compensation. Nothing is said about attorneys' fees, incurred either by the plaintiff or by the receiver.

The Act of 1853 is not mentioned in *Fraser* v. *Cole*, 214 Fed. 556, *Leary* v. *United States*, 257 Fed. 246, *Motion Picture Patents Co.*, v. *Steiner*, 201 Fed. 63, or *Marks* v. *Leo Feist*, 8 Fed. (2d) 460; nor do any of these cases have any bearing upon the interpretation of the Act.

It must be apparent, therefore, that very little, if any, authority supports the Southern Company's contention that the Act of 1853 is controlling.

On the other hand, the decisions of this court and the lower federal courts conclusively establish that the Act regulates party and party costs only.

It has always been more or less customary, in most states in this country, to allow certain small items of attorneys' fees to be taxed as ordinary costs between party and party. These small items of attorneys' fees were and are allowed at law, as well as in equity, and often in criminal, as well as civil, proceedings. At law, their allowance is not discretionary with the court, but they are taxed, as of course and as a matter of right, in favor of the prevailing party.

That the Act of 1853 dealt with such fees only is wholly apparent from an examination of the prior legislation of Congress, and the other circumstances attendant upon the passage of the bill.

The Act of Congress of September 29, 1789, provided that the fees allowed in the Circuit and District Courts, at law, in equity and in admiralty, should be the same as those allowed in the Courts of the respective states.

The Act of May 8, 1792, fixing the compensation of officers of the courts of the United States, entitled the district attorneys to the fees allowed in their respective states.

The Act of March 1, 1793, fixed the fees of the counsellor or attorney in the District Court, in admiralty proceedings only, as follows: For drawing libel, claim or answer, $3.00; for drawing interrogatories $3.00; for all other services in any one cause, $3.00. The Act provided that in all causes other than in admiralty, such attorneys' and counsellors' fees should be allowed and taxed as are allowed in the courts of the respective states.

The Act of February 28, 1799, fixed the fees to be allowed to district attorneys as follows: For drawing interrogatories, $5.00; for drawing libel, claim or answer, $6.00; and for all other services in any one cause, $6.00.

The Act of March 3, 1847, "for the reduction of costs and expenses of proceedings in admiralty," provided that in cases where the libellant should recover $100 or less, no attorney's or proctor's fee should be allowed or taxed.

The Act of 1853 provided "that in lieu of the compensation *now allowed by law* to attorneys, solicitors and proctors in the United States Courts," the amounts therein specified should be taxed and allowed.

The Act begins as follows:

> *"An Act to Regulate the Fees and Costs to be Allowed Clerks, Marshals and Attorneys of the Circuit and District Courts of the United States, and for other purposes.*
>
> *Be it Enacted by the Senate and House of Rrepresentatives of the United States of America in Congress assembled.* That in lieu of the compensation now allowed by law to attorneys, solicitors, and proctors in the United States courts, to United States District Attorneys, clerks of the District and Circuit Courts, marshals, witnesses, jurors, commissioners and printers, in the several States, the following and no other compensation shall be taxed and allowed. But this fact shall not be construed to prohibit attorneys, solicitors and proctors from charging to and receiving from their clients, other than the Government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with the general usage in their respective States, or may be agreed upon between the parties."

Very evidently, the reference is to the earlier statutes above referred to; and the $20.00 docket fee is made to take the place of the miscellaneous small fees allowed attorneys under the earlier statutes and under the practice of the respective states, adopted by said statutes.

The debates and proceedings in Congress, attendant upon the passage of the Act of 1853, emphasize as the purposes sought to be accomplished by the Act, the following: (1) the establishment of uniformity as to fees throughout all the districts; (2) the abolition of the padding of cost accounts by the unnecessary and fraudulent multiplication of the various proceedings giving rise to fees. Under many of the state fee bills there was no limit on the amount of fees which could be taxed in

any one case; and it was asserted in Congress that in many cases, even those involving small amounts and simple issues, fees had been run up into thousands of dollars. (Congressional Globe, Volume 22, Appendix, p. 207).

The New York statute, often referred to in the debates in Congress, was typical. It allowed the following counsellors' or solicitors' fees: A retaining fee of $5.00; for perusing and signing every bill, answer, plea, demurrer, and all interrogatories and exceptions, $2.50; for perusing and settling decree, $2.50; for preparing every special motion, $2.50; for arguing every plea, demurrer and exceptions, $5.00. See Blake, Practice of the Court of Chancery of the State of New York, 2d Ed. (1824), p. 558; also Walworth, Rules and Orders of the Court of Chancery of the State of New York (1839), p. 193.

Senator Bradbury of Maine, in charge of the fee bill of 1853 in the Senate, thus outlined the evils to be remedied by the Act (Congressional Globe, V. 22, Appendix, p. 207):

> "When this system (as established by the prior Acts of Congress) was adopted, it had the semblance of equality, which does not now exist. There were then but sixteen states, in all of which the laws prescribed certain taxable costs to attorneys for the prosecution and defense of suits. In several of the states which have since been added to the union, no such cost is allowed; and in others the amount is inconsiderable. As the state fee bills are made so far the rule of compensation in the federal courts, the Senate will perceive that totally different systems of taxation prevail in the different districts. In some, the district attorney receives no compensation beyond his small salary and per diem for a large

> portion of his most important services; while in others his fees are enormous, and the amount of cost which the losing party is made to pay the attorney on the other side in civil suits is so large as to be flagrantly oppressive."

The Act does not cover merely the fees of attorneys, but of clerks, marshals, witnesses, jurors, commissioners and printers. And, as stated by the court in *Goodyear* v. *Sawyer,* 17 Fed. 2 (1883), it "mentions the fees due the attorney in the same connection with those due the clerk and marshal, and requires them to be taxed by the same words it requires the fees of those officers to be taxed." This circumstance indicates clearly that the attorneys' fees referred to are those taxable, along with clerk's and marshal's fees, as between party and party. Furthermore, the Act authorizes the fees to be taxed by judge *or clerk*. The Act reads:

> "The bill of fees of clerk, marshal and attorneys, and the amount paid printers, and witnesses, and lawful fees for exemplifications and copies of papers necessarily obtained for use on trial in cases where by law costs are recoverable in favor of the prevailing party, shall be taxed by a *judge or clerk* of the court, and be included in and form a portion of a judgment or decree against the losing party."

Certainly therefore the statute cannot refer to those costs which are to be awarded within the discretion of a court of equtiy.

The very fact that the Act does not refer to the $20.00 allowance as an attorney's fee, but as a *docket* fee, is some indication that it is an ordinary item of costs, taxable, like clerk's fees, as between party and party.

This court has held, on numerous occasions, that the

Act of 1853 covers only party and party costs. In *In Re Paschal,* 10 Wall. 483 (1870), the court said:

> "And whilst, as between party and party in a cause, the statutory fee bill fixes the amount of costs to be recovered, as between attorney or solicitor and client a different rule obtains."

Likewise in *Trustees* v. *Greenough,* 105 U. S. 527 (1881):

> "The fee bill is intended to regulate only those fees and costs which are strictly chargeable as between party and party, and not to regulate the fees of counsel and other expenses and charges as between solicitor and client."

In *United States* v. *Waters,* 133 U. S. 208 (1889), it was stated that

> "Both before and since the enactment of the statute of 1853, courts in the exercise of their discretion have allowed counsel fees in many cases, without question when reviewed by this court."

People of Sioux County v. *National Surety Co.,* 276 U. S. 238, 48 S. Ct. 239 (1928), held that under a state statute allowing attorneys' fees to be taxed as costs in actions on insurance policies, such a fee might be taxed in an action brought in the state court and subsequently removed to the Federal Court. The court said:

> "That the statute directs the allowance, which is made to plaintiff, to be added to the judgment as costs are added does not make it costs in the ordinary sense of the traditional, arbitrary and small fees of court officers, attorneys' docket fees and the like, allowed to counsel by R. S. Secs. 823, 824."

See also to the same effect:

Business Mens' Assurance Co. v. *Campbell,* 18 Fed. (2d) 223, (C. C. A. 8th Cir.) 1927.
National Surety Co. v. *Lyons,* 16 Fed. (2d) 688, (C. C. A. 8th Cir.) (1926).
Cuyler v. *Atlantic & N. C. R. Co.,* 132 Fed. 570 (1904).
Goodyear v. *Sawyer,* 17 Fed. 2 (1883).
Louisiana State Lottery Co. v. *Clark,* 16 Fed. 20 (1883).
Ex parte Jaffray, 13 Fed. Cas. No. 7170 (1869).

These cases state the rule in the following terms:

"It is contended in behalf of the defendant that as the statute of the state requires this allowance to be taxed as costs, it is unenforceable in a court of the United States, as Congress provided for costs in that court, and none other can be taxed in a court of the United States.

In our opinion this applies only to ordinary costs, and not to allowances for attorneys' services." (*Business Men's Assurance Co.* v. *Campbell,* 18 Fed. (2d) 223, 224.)

"Reading the whole statute together * * * in the light of previous legislation and the practice under that legislation, and the law of costs at law, in equity, and in admiralty * * * it is plain that these 'docket fees' * * * are a lump sum substituted for the small fees allowed attorneys and solicitors under the old system." (*Goodyear* v. *Sawyer,* 17 Fed. 2.)

"The fee bill is intended to regulate only those fees and costs which are strictly chargeable as between party and party, and not to regulate the fees of counsel and other charges and expenses as between solicitor and client." (*Louisiana State Lottery Co.* v. *Clark,* 16 Fed. 20, 21.)

See also *Beach, Modern Equity Practice* (1894), Vol. 2, Sec. 1015; and *Street, Federal Equity Practice* (1909), Vol. 2, Sec. 2034. The latter treatise discusses the $20.00 docket fee allowed by the Act of 1853, as follows:

> "The ordinary docket fee, or solicitor's fee, of twenty dollars, allowed by statute to be taxed in every cause that comes to a final hearing, is not variable in amount, and when taxable is not dependent on the discretion of the court. This item is therefore taxable as between party and party, and though it represents a solicitor's fee, it is not an item of costs as between solicitor and client, in the sense in which this expression is commonly used."

In addition to the foregoing direct authorities to the effect that the Act of 1853 covers party and party costs only, may be cited the following cases stating in more general terms that costs in equity are not regulated by statute:

Newton v. *Consolidated Gas Co.*, 265 U. S. 78, 44 S. Ct. 481 (1923).
In re Peterson, 253 U. S. 300, 40 S. Ct. 543 (1919).
Stallo v. *Wagner*, 245 Fed. 636, 158 C. C. A. 64 (1917).
In re Schocket, 177 Fed. 583 (1910).
The Gordon Campbell, 131 Fed. 963 (1904).
Tesla Electric Co. v. *Scott*, 101 Fed. 524 (1900).

In *In re Schocket, supra,* the court said:

> "A court of equity in extending an order for the taxation of costs so that it may include charges and expenses properly incurred, seems to proceed rather upon considerations of the substantial equities of the parties than upon ordinary statutory provisions concerning costs. *3 Daniell's Chancery*, (1st Am. Ed.) p. 1586."

Attention may be called also to the fact that the Act, regulating, as it does, party and party costs only, deals merely with costs in the District Court, and makes no provision for costs or allowances for services or proceedings in the Circuit Court of Appeals or the Supreme Court. The act is one "to regulate the fees and costs to be allowed clerks, marshals and attorneys of the Circuit and district courts of the United States."

Inasmuch as the Act regulates party and party costs only (and those costs only in the district court), it has no bearing upon the power of a court of equity to award, in proper cases, costs as between solicitor and client. Indeed, even as to party and party costs, the Act controls only as regards the items of costs mentioned. In many cases items have been taxed as costs which are not provided for in the statute. See to this effect:

In re Peterson, 253 U. S. 300, 40 S. Ct. 543 (1919).

Western Union Telegraph Co. v. *Louisville & N. R. Co.,* 208 Fed. 581 (1913).

Matheson v. *Hanna-Schoelkopf Co.,* 128 Fed. 162 (1904).

Kaempfer v. *Taylor,* 78 Fed. 795 (1897).

Jerman v. *Stewart, Gwynne & Co.,* 12 Fed. 271 (1882).

Spaulding v. *Tucker,* 22 Fed. Cas. No. 13221 (1871).

Jordan v. *Agawam Woolen Co.,* 13 Fed. Cas. No. 7516 (1869).

State statutes allowing attorneys' fees to be taxed as costs in certain cases, have often been given effect in actions brought in the federal courts. This has been done on the theory that where Congress has not regulated the subject of costs, the Federal Courts, in legal

actions, follow the state rule. The cases holding such fees properly taxable are really decisions to the effect that the Act of 1853 does not cover such allowances. The following cases are examples:

National Surety Co. v. *Lyons*, 16 Fed. (2d) 688 (C. C. A. 8th Cir.) (1926).

Globe Indemnity Co. v. *Sulpho-Saline Bath Co.*, 299 Fed. 219 (C. C. A. 8th Cir.) (1924), *Certiorari* denied, 266 U. S. 606.

Michigan Aluminum Foundry Co. v. *Aluminum Co. of America*, 190 Fed. 903 (1911).

Williamson v. *Liverpool & London Ins. Co.*, 141 Fed. 54 (C. C. A. 8th Cir.), 1905.

The Southern Company admits that notwithstanding the Act, allowances for expenses and counsel fees within the rule of *Trustees* v. *Greenough*, 105 U. S. 527, may be made. (Brief in support of application for *certiorari*, p. 32.) But if the Act is to be interpreted in accordance with the Southern Company's contention—that is, as covering solicitor and client costs—it is difficult to sustain the allowance in *Trustees* v. *Greenough*. There is nothing unique about the fees taxed in *Trustees* v. *Greenough*. That case is merely one example of the allowance of solicitor and client costs. So far as concerns the controlling effect of the Act of 1853, the situation in *Trustees* v. *Greenough* is precisely the same as in the present case. *Trustees* v. *Greenough*, and every other case since 1853 in which costs as between solicitor and client have been awarded, establish beyond question that the Act of 1853 has no bearing upon the present controversy.

IV.

The power of the Federal Courts in equity cases.

There being then no statute bearing upon the power of the District Court to allow solicitor and client costs in this case, the power to award such costs is dependent upon general equitable principles.

Article III, Section 1 of the Constitution vests the "judicial power of the United States" in the Supreme Court and such inferior courts as Congress may establish. The distinction between law and equity is referred to in Article III, Section 2. It is elementary that the Constitution vested in the Courts of the United States the common law powers of the English law courts, and the equity powers of the then High Court of Chancery in England.

The following authorities conclusively establish that the equity jurisdiction of the Federal Courts is the same as that possessed by the High Court of Chancery in England at the time of the adoption of our Constitution:

Waterman v. *Canal-Louisiana Bank and Trust Company*, 215 U. S. 33, 30 S. Ct. 10 (1909).
Mississippi Mills v. *Cohn*, 150 U. S. 202 (1893).
Kirby v. *Lake Shore & M. S. R.*, 120 U. S. 130 (1886).
Russell v. *Farley*, 105 U. S. 433 (1881).
Payne v. *Hook*, 7 Wall. 425 (1868).
State of Pennsylvania v. *Wheeling Bridge Co.*, 18 How. 460 (1855).
Fontain v. *Ravenel*, 17 How. 369 (1854).
Story v. *Livingston*, 13 Pet. 359 (1839).
Robinson v. *Campbell*, 3 Wheat. 212 (1818).
Childs v. *Ferguson*, 181 Fed. 795, 104 C. C. A. 305 (1910).
Karns v. *Imlay Rapid Cyanide Process Co.*, 181 Fed. 751 (1910).

Matheson v. *Hanna-Schoelkopf Co.*, 128 Fed. 162 (1904).
Loring v. *Marsh*, 15 Fed. Cas. No. 8515 (1863).

In the rules promulgated by the Supreme Court in 1822, we find the following:

> "Rule 33. In all cases where the rules prescribed by this court or by the Circuit Court do not apply, the practice of the Circuit Court shall be regulated by the practice of the High Court of Chancery in England."

Rule 90, originally adopted in 1842, and revised in 1866, was as follows:

> "Rule 90. In all cases where the rules prescribed by this court or by the Circuit Court do not apply, the practice of the Circuit Court shall be regulated by the present practice of the High Court of Chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local conveniences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice."

Rule 90, though not carried forward into the present equity rules, adopted in 1912, has been expressly held to continue in full force and effect, its omission from the present rules being due to the fact that the rule had become so imbedded in the jurisprudence of the Federal Courts as to make its inclusion no longer necessary. *Individual Drinking Cup Co.* v. *Union News Co.*, 250 Fed. 625, 162 C. C. A. 641 (1918); *Lindley* v. *Denver*, 259 Fed. 83, 170 C. C. A. 151 (1919).

V.

The Federal Courts in equity cases have power to allow solicitor and client costs.

The Circuit Court of Appeals, after reviewing the English decisions dealing with the taxation of solicitor and client costs, concluded that they authorized such costs in the following types of cases:

> (a) Where gross charges of fraud and misconduct have been made and not sustained;
>
> (b) Where the main ground of the suit is false, unjust, vexatious, wanton or oppressive, and so shown to be;
>
> (c) Where a fiduciary relation exists, such as trustee and *cestui que trust*, pledgor and pledgee, or principal and agent, and the fiduciary is put to expense, either in defending an unfounded suit, or in administering or protecting and preserving the trust property or pledged property. (See Rec. V. 1, p. 738, 28 Fed. [2d] 241.)

(a) The English authorities undoubtedly authorize the imposition of solicitor and client costs in the first type of case. See to this effect the following:

> *Ex parte Simpson*, 15 Ves. Jr. 476 (1809).
> *Passingham* v. *Sherborn*, 9 Beavan 424 (1839).
> *Ibberson* v. *Worth*, 1 Jur. (N. S.) 440 (1855).
> *D'Oechsner* v. *Scott*, 24 Beavan 239 (1857).
> *Forester* v. *Read*, L. R. 6 Ch. App. 40 (1870).
> *Kevan* v. *Crawford*, L. R. 6th D. 29 (1877).
> *Fane* v. *Fane*, L. R. 13 Ch. D. 228 (1878).
> *Bruty* v. *Edmundson*, L. R. (1917) 2 Ch. 285.

There is no fiduciary relationship in these cases. Nor is there any fund in court to be administered. The cases seem to evidence a policy for the discouragment of

scandalous and impertinent charges. In *Ex parte Simpson, supra,* Lord Eldon said:

> "There would be much reason to regret that a court should not be armed with the power to protect parties from the expense, and its records from the stain, which too frequently arises from the introduction of irrelevant and scandalous matter."

The English rule does not impose solicitor and client costs in every case where fraud is alleged and not substantiated. The imposition of all costs in equity is of course discretionary. In most of the cases where unproven charges of fraud or misconduct have called forth the exercise of the discretion, the charges have been patently unwarranted and recklessly made or else without bearing on the issues of the case, and inserted with the evident purpose of creating prejudice.

We have found no American case imposing solicitor and client costs upon a plaintiff merely because he has made baseless and unwarranted charges of fraud or misconduct against the opposing party, there being no fiduciary relationship involved. Nor is there any case, we believe, which criticizes or repudiates the doctrine of the foregoing English authorities. It has been held, however, that party and party costs will be denied to the prevailing party in an equity case, where, wholly without foundation, he makes charges of gross misconduct against the other party. *Mayhew* v. *Phoenix Insurance Co.,* 23 Mich. 105 (1871).

It is submitted that, in a flagrant case, a power in a court of equity to discourage reckless and prejudicial charges of misconduct by the imposition of solicitor and client costs upon the offending party, can be exercised to the betterment of judicial administration.

(b) The second type of case in the classification made by the Court of Appeals, is one where the suit is false, unjust, wanton or oppressive. The mere fact that the defendant prevails in the litigation does not fix the suit within this category. In most of the English cases where solicitor and client costs have been imposed in situations of this character, the action was so obviously baseless and unwarranted that bad faith in the institution of the action was reasonably apparent. See

Dungey v. *Angove*, 2 Ves. Jr. 304 (1794).
Simpson v. *Malherbe*, 4 Gifford 707 (1865).
Palmer v. *Walesby*, L. R. 3 Ch. A. C. 732 (1868).
Turner v. *Collins*, L. R. 12 Eq. Cas. 438 (1871).

In *Simpson* v. *Malherbe*, *supra*, the court said:

> "When the court finds that a suit is instituted, not *bona fide* for the direct ostensible purpose, but with a view to some ulterior and improper purposes, its duty is to see that those who are improperly sued in such a manner have justice done to them by a full and proper indemnity against all the expenses which they have unjustifiably been obliged to incur."

On the same basis, such costs have been imposed in England for the making of excessive and frivolous amendments.

Deggo v. *Colebrook*, 1 Atk. 395 (1738).
Rennett v. *Green*, 1 Cox Ch. Cas. 253 (1786).
Masserne v. *Lyndon*, 2 Brown 291 (1788).

As prefatory to a discussion of the American cases dealing with the right to solicitor and client costs in connection with baseless and unwarranted litigation, a brief consideration of party and party costs in such cases may be helpful.

Originally, no costs of any kind were awarded, either at law or in equity. *Day* v. *Woodworth*, 13 How. 363 (1851). "But the plaintiff who made a false clamor, and either failed to try his case, or trying it, failed to sustain it, was amerced heavily, and the fine went to the King as a penalty for his invasion of a court of justice." *Goodyear* v. *Sawyer*, 17 Fed. 2, 9 (1883). The statutes of Marlbridge (1267) and Gloucester (1278), and later statutes, "by constantly increasing severity, sought to discourage false suits by giving a defendant full costs against a plaintiff who failed in his action, and were especially severe on one who discontinued his suit, or was nonsuited for his own default without a trial; these costs to the defendant taking the place of the former fine to the King." *Goodyear* v. *Sawyer*, 17 Fed. 2, 10 (1883). The statute of 17 Richard II, c. 6 (1394), is said to be the foundation of costs in equity. *Beames, Equity Costs*, 4. It provided "forasmuch as people can be compelled to come before the King's council, or in the chancery, by writs grounded upon untrue suggestions, that the chancellor for the time being, presently after that such suggestions be duly found and proven untrue, shall have power to ordain and award damages according to his discretion to him which is so troubled unduly." *Goodyear* v. *Sawyer*, 17 Fed. 2, 10 (1883); *Stallo* v. *Wagner*, 245 Fed. 636, 158 C. C. A. 64 (1917). The statute of 15, Henry VI, c. 4, recited that "divers persons were greatly vexed and grieved by writs of subpoena," and enacted that "surety be found to satisfy the party so grieved and vexed, for his damages and expenses, if so be that the matter cannot be made good which is contained in the bill." *Beames, Equity Costs*, 7. The statute of 4 Anne, c. 16, No. 23 (1706), "for preventing vexatious suits in courts of equity," enacted "that upon the plaintiff's

dismissing his own bill, or the defendant's dismissing the same for want of prosecution, the plaintiff in such suit shall pay to the defendant or defendants his or their full costs, to be taxed by a master." *Beames, Equity Costs, 85.*

Costs at law and in equity, therefore, arose out of and were grounded upon a policy, either for the punishment of a plaintiff who made a "false clamor," or for the protection and indemnification of the party unjustly proceeded against, or both. That the principle has remained predominant in legal actions is proven by the rule that costs at law follow the event of the suit. The losing party pays, and the winner is entitled to recover costs.

In equity, however, costs are discretionary. *Newton* v. *Consolidated Gas Co.*, 265 U. S. 78, 44 S. Ct. 481 (1923). The court need not award them to the prevailing party. Indeed, it may award them against the prevailing party. The rule, that equity costs are discretionary, means that they are awarded according to the conscience of the court. *Stallo* v. *Wagner*, 245 Fed. 636, 158 C. C. A. 64 (1917). That is to say, they are awarded as the equities of the case may require. *In re Schocket*, 177 Fed. 583 (1910). And what are the "equities" of the case?

If the claim or defense prosecuted or urged is clearly without foundation, this fact will be taken into account in taxing costs. *The Robert Jenkins*, 22 Fed. 797 (1885); *Johnson* v. *Blanchard*, 7 Fed. 597 (1885); *The Boston*, 3 Fed. Cas. No. 1672 (1846); *In re Clark*, 174 Ia. 449, 154 N. W. 759 (1915); *Geer* v. *Finn*, 196 Mich. 738, 163 N. W. 20 (1917).

One making a fraudulent claim will be taxed with costs. *In re Schocket*, 177 Fed. 583 (1910).

An assignee for creditors, with notice of facts which

should put him on inquiry as to fraud in connection with the assignment, is not entitled to his costs. *Hastings* v. *Spenser*, 11 Fed. Cas. No. 6201 (1853).

A party who takes a frivolous appeal, or makes a frivolous exception, for purposes of delay, is taxable with costs in connection therewith. *Chicago Terminal Transfer Co.* v. *Bomberger*, 130 Fed. 884, 65 C. C. A. 64 (1904); *Equity Rule 67*.

One who seeks relief to which he is clearly entitled, but with the ulterior motive and purpose of injuring the other party, will be denied his costs. *The Ellen Holgate*, 30 Fed. 125 (1887); *Corkery* v. *Dorsey*, 223 Mass. 97, 111 N. E. 795 (1916).

A complainant will be decreed his costs though no recovery is had, if he is misled into bringing suit by the misconduct or misrepresentations of the defendant. *Case of Pettit*, 19 Fed. Cas. No. 11047; *Twist* v. *Babcock*, 48 Mich. 513, 12 N. W. 680 (1882); *McCloskey* v. *Kirk*, 243 Pa. 319, 90 At. 73 (1914).

A plaintiff who brings an unnecessary suit, when his claim is admitted and could be adjusted without litigation, is denied his costs. *Wilcke* v. *Duross*, 144 Mich. 243, 107 N. W. 907 (1906); *Allen* v. *City of Detroit*, 167 Mich. 464, 133 N. W. 317 (1911); *McCloskey* v. *Bowden*, 82 N. J. E. 410, 89 At. 528 (1914); *Stafford* v. *Mott*, 3 Paige 100 (1832); *Gates* v. *Parmly*, 93 Wis. 294, 67 N. W. 739 (1896).

The foregoing cases deal with chancery costs as between party and party. They seem to evidence a broad equitable doctrine that a court of equity will exercise its discretionary power over costs to effect, as far as may be, justice between the parties. Unwarranted, unnecessary, fraudulent and oppressive litigation will entail, upon the party responsible therefor, the duty of

indemnifying the injured party, in so far as party and party costs can indemnify.

The American courts also impose solicitor and client costs in such cases.

In *The Apollon*, 9 Wheat. 362 (1824), attorneys' fees were awarded to the plaintiff in a suit in admiralty for the illegal seizure of a ship. Justice Story, delivering the opinion of the court, said:

> "The fifth item, allowing $500 as counsel fees, is, in our opinion, unexceptionable. It is the common course of the admiralty to allow expenses of this nature, either in the shape of damages, or as part of the costs. The practice is very familiar on the prize side of the court; it is not less the law of the court in instance causes, it resting in sound discretion to allow or refuse the claim."

Patterson v. *Ball*, 18 Fed. Cas. No. 10, 823 (1809), was an action brought in the District of Columbia by a foreign executor, the action there being wholly unjustifiable. Upon dismissal of the bill, the defendant was awarded an attorneys' fee, taxable as costs against the plaintiff.

In *The Elizabeth Frith*, 8 Fed. Cas. No. 4361 (1831), it is stated that in an action for seaman's wages, counsel fees will be allowed as costs if the defense is merely vexatious. The case does not involve solicitor and client costs to the defendant in an unwarranted suit, but, rather, solicitor and client costs to the plaintiff in connection with an unwarranted defense. The same principle, however, applies. In *In re Wright*, 16 Fed. 482 (1883), the court said:

> "Where an action has been unreasonably, unjustifiably, or improperly defended, so that unnecessary expenses have been incurred, I have no doubt

> a court of admiralty may, in its discretion, as a court of equity may do in analogous cases, order the costs or any part of them, as may be proper, to be paid personally by the litigating parties."

In *Gulf & S. I. R. Co.* v. *Walker,* 104 Miss. 363, 61 So. 458 (1913), an attorneys' fee was awarded to the defendant in an unwarranted injunction suit, brought to restrain the prosecution of certain actions at law. To the same effect is *Joslyn* v. *Parlin,* 54 Vt. 670 (1881).

Spring Garden Insurance Co. v. *Amusement Syndicate Co.,* 178 Fed. 519, 102 C. C. A. 29 (1910), though not involving precisely the same point, is of value in this connection. There actions at law had been brought in the state court on certain insurance policies. A state statute authorized the allowance of attorneys' fees to the plaintiff in such cases, to be taxed as costs. The actions were subsequently removed to the federal court. This was a suit in equity, by the insurance companies, to enjoin the prosecution of the actions at law. The court held that there was no equity in the bill, that the actions at law on the policies were entirely proper, and that the plaintiff should be required to pay the costs in those actions, including the attorneys' fee provided by the statute.

J. E. North Lumber Co. v. *Gary,* 83 Miss. 640, 36 So. 2 (1904), and *Bank of Philadelphia* v. *Posey,* 130 Miss. 530, 92 So. 840 (1922), hold that upon the dissolution of an injunction, improvidently granted, the defendant is entitled to an allowance for attorneys' fees.

In *O'Neal* v. *Spivey,* 145 S. E. 71 (Ga.) (1928), attorneys' fees were allowed to the plaintiff in an equity case, under a statute allowing them "if the defendant has acted in bad faith, or has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and ex-

pense." The court held that the statute was merely a codification of the common law rule.

North Missouri Railroad Co. v. *Lackland,* 25 Mo. 515 (1857), was a condemnation proceeding, brought by a railroad company to acquire a right of way across defendant's land. After the filing of the Commissioner's report assessing damages, the company changed its proposed route and sought to dismiss the proceeding. The condemnation statute provided that the court should adjudge the costs of the proceeding according to equity. The court held that the company had the right to dismiss only upon indemnifying the defendant for all costs and expenses, including attorneys' fees, both in the trial and appellate courts, incurred by him. *North Missouri Railroad Co.* v. *Reynal,* 25 Mo. 534 (1857), is a companion case to the same effect.

A plaintiff who improvidently and without warrant secures the appointment of a receiver is personally liable for the receiver's costs and expenses, including attorneys' fees, when, upon final hearing or appeal, the appointment is held unwarranted and the receivership terminated.

Beach v. *Macon Grocery Co.,* 125 Fed. 513, 60 C. C. A. 557 (1903).

In re Lacov, 142 Fed. 960, 74 C. C. A. 130 (1905).

In re Wentworth Lunch Co., 191 Fed. 821, 112 C. C. A. 335 (1911).

Myers v. *Frankenthal,* 55 Ill. App. 390 (1894).

City of St. Louis v. *St. Louis Gas Light Co.,* 11 Mo. App. 237 (1881).

Weston v. *Watts,* 45 Hun. 219 (1887).

Hernandez v. *Brookdale Mills,* 232 N. Y. 552, 134 N. E. 568 (1921).

Anderson v. *Marietta National Bank,* 93 Okla. 241, 220 Pac. 883 (1923).

Delcambre v. *Murphy,* 5 S. W. (2d) 789 (Tex. Civ. App.) (1928).

The point is fully discussed by the Circuit Court of Appeals for the Second Circuit in *In re Lacov, supra.* as follows:

> "The question presented for review is whether petitioning creditors are liable for the expenses of a receivership in a case where upon commencing a proceeding against a debtor to have him adjudicated a bankrupt they have applied to the court and obtained the appointment of a receiver of his property, and the proceeding is subsequently dismissed as unfounded; the receiver meanwhile having entered upon his duties, taken charge of the property, and incurred expenses.
>
> There is no express provision in the bankruptcy act, which authorizes the court of bankruptcy to compel petitioning creditors to pay the costs of a receivership under such circumstances, and the power of the court must therefore rest upon its implied authority to require those to bear the expenses of a proceeding, which they have instituted without sufficient cause, and in the course of which they have invoked its assistance and asked it to put its machinery in motion for their benefit, in such a way that expenses will accrue, which must be borne either by them or the adverse party. Courts of equity frequently exercise this power in advance of taking action, and in the absence of any statutory authority. Thus, in granting an injunction, it is common practice to require the plaintiff to give a bond or make a deposit in the registry to secure the adverse party against loss if the process be subsequently vacated. The precise question, however, has been considered frequently and determined by the courts.
>
> In *Knickerbocker* v. *McKindley Coal Co.*, 172 Ill. 535, 50 N. E. 330, 64 Am. St. Rep. 54, it was decided that where the property that comes into the possession of the court is insufficient to pay the expenses necessarily incurred by the receiver in its management, the

deficiency may be taxed against the applicant for the receiver.

Couper v. *Shirley*, 75 Fed. 168, 21 C. C. A. 288, was an action to foreclose a mortgage in which, at the instance of the plaintiff, a receiver of the rents and profits of the mortgaged premises was appointed, and subsequently, upon the ground that the defendant was entitled to the rents and profits during the pendency of the action, the court required the receiver to pay them over, without compensation for his expenses and services, to the defendant. Upon an appeal by the receiver the Circuit Court of Appeals said:

'It may be that some provision ought to have been made for his pay, but it is clear to our minds that upon the facts presented in this case the party who improperly procured the appointment of the receiver should have been required, if the receiver was entitled to anything, to pay his expenses and services.' "

This court fully recognized the power of a court to impose upon the plaintiff costs of a receivership improvidently granted, in *Atlantic Trust Co.* v. *Chapman*, 208 U. S. 360, 28 S. Ct. 406 (1908). In that case, however, the imposition of such costs was denied, on the ground that the application for the receiver was reasonable under the circumstances.

The plaintiff has also been decreed to pay the expenses of a receivership, including attorneys' fees, when the receivership estate has been insufficient in amount to meet such costs. *Buell* v. *Kanawha Lumber Corp.*, 201 Fed. 762 (1912); *Ephriam* v. *Pacific Bank*, 129 Cal. 589, 62 Pac. 177 (1900).

In re Schockett, 177 Fed. 583 (1910), though not precisely in point, is persuasive in this connection. The claimant of property in the hands of a trustee in bankruptcy filed a reclamation petition against the trustee.

The petition was dismissed as fraudulent and wholly unwarranted. The trustee was awarded, as part of the costs, charges and expenses incurred by him in preserving the property during the pendency of the petition. Note the language of the court:

> "The petitioner in reclamation having made application to a court exercising chancery powers in the administration of the bankrupt's assets, seeking a determination of his right to have returned to him specific property held by the trustee for the benefit of the creditors, is justly chargeable for such necessary expenses in the custody of the goods as were occasioned by the proceedings instituted by him, and which would not have been incurred, but for his intervention. To cast upon the property belonging to the creditors the costs of preservation pending the fraudulent claim of an intervener is contrary to equity. I am of the opinion that the court has authority to so extend an order for the taxation of costs against the intervener as to include a direction to tax charges and expenses of custody, as well as ordinary costs. * * * "

A public policy in favor of the imposition of solicitor and client costs against one who instigates an unwarranted and baseless suit, is evidenced by various statutes and rules of court imposing costs and attorneys' fees in certain cases where unreasonable or unwarranted claims or defenses are insisted upon. State statutes are very common providing for the allowance of attorneys' fees in action on insurance policies and on claims against common carriers, not paid or settled within a certain time after the cause of action accrues. In the following cases, statutes of this character were given effect:

> *Chicago & N. W. Ry. Co.* v. *Nye-Schneider-Fowler Co.*, 260 U. S. 35, 43 S. Ct. 55 (1922).

Missouri, K. & T. R. Co. v. *Harris*, 234 U. S. 412, 34 S. Ct. 790 (1913).
Missouri, K. & T. R. Co. v. *Cade*, 233 U. S. 642, 34 S. Ct. 678 (1914).
Farmers & Merchants Insurance Co. v. *Dobney*, 189 U. S. 301, 23 S. Ct. 565 (1902).
Home Life Insurance Co. v. *Fisher*, 188 U. S. 726, 23 S. Ct. 380 (1902).
Iowa Life Insurance Co. v. *Lewis*, 187 U. S. 335, 23 S. Ct. 126 (1902).
Fidelity Mutual Life Assn. v. *Mettler*, 185 U. S. 308, 22 S. Ct. 662 (1901).

The purpose of such statutes is well indicated by the following statement of the court in *Missouri, K. & T. R. Co.* v. *Cade, supra:*

> "Manifestly, the purpose is merely to require the defendant to reimburse the plaintiff for a part of his expenses not otherwise recoverable as 'costs of suit.' So far as it goes, it imposes only compensatory damages upon a defendant who, in the judgment of the legislature, unreasonably delays and resists payment of a just demand. The outlay for an attorney's fee is a necessary consequence of the litigation, and since it must fall upon one party or the other, it is reasonable to impose it upon the party whose refusal to pay a just claim renders the litigation necessary. The allowance of ordinary costs of suit to the prevailing party rests upon the same principle. *2 Bacon Abr. Title Costs.* Numerous cases in the state courts have sustained similar legislation. *Vogel* v. *Pekoc*, 157 Ill. 339, 334, 346, 30 L. R. A. 491, 42 N. E. 386; *Burlington, C. R. & N. R. Co.* v. *Dey*, 82 Iowa 312, 340, 12 L. R. A. 436, *3 Inters. Com. Rep. 584*, 31 Am. St. Rep. 477, 48 N. W. 98; *Cameron* v. *Chicago, M. & St. P. R. Co.*, 63 Minn. 384, 388, 31 L. R. A. 553, 65 N. W. 652; *Wortman* v. *Kleinschmidt*, 12 Mont. 316, 330,

30 Pac. 280. If a reasonable penalty may be imposed for failure to satisfy a demand found to be just, it follows *a fortiori* that costs and an attorney's fee may be. See *Atchison, T. & S. F. R. Co.* v. *Matthews*, 174 U. S. 96, 105, 43 L. Ed. 909, 913, 19 Sup. Ct. Rep. 609; *Farmers' & M. Ins. Co.* v. *Dobney*, 189 U. S. 301, 304, 47 L. Ed. 821, 825, 23 Sup. Ct. Rep. 565."

Title 49, Sections 8 and 16 (2), United States Code Annotated, provides for an allowance of attorneys' fees, to be taxed as costs, in both trial and appellate courts, in certain cases under the Interstate Commerce Act, where the defendant carrier fails, for a stated period, to comply with the order of the Interstate Commerce Commission. *Louisville & N. R. Co.*, v. *Dickerson*, 191 Fed. 705, 112 C. C. A. 295 (1911). The provision was upheld by this court, in *Meeker* v. *Lehigh Valley R. Co.*, 236 U. S. 412, 35 S. Ct. 328 (1914), in the following terms:

"The contention that the provision for an attorney's fee for services in the suit is invalid as being purely arbitrary, and as imposing a penalty for merely failing to pay a debt, is without merit. The provision is leveled against common carriers engaged in interstate commerce, a quasi public business, and is confined to cases wherein a recovery is had for damages resulting from the carrier's violation of some duty imposed in the public interest by the act to regulate commerce. *Atlantic Coast Line R. Co.* v. *Riverside Mills*, 219 U. S. 186, 208, 55 L. Ed. 167, 183, 31 L. R. A. (N. S.) 7, 31 Sup. Ct. Rep. 164. One of its purposes is to promote a closer observance by carriers of the duties so imposed; and that there is also a purpose to encourage the payment, without suit, of just demands, does not militate against its validity. *Missouri, K. & T. R. Co.*

v. *Cade*, 233 U. S. 642, 651, 58 L. Ed. 1135, 1138, 34 Sup. Ct. Rep. 678, and cases cited. It requires that the fee be reasonable and fixed by the court, and does not permit it to be taxed against the carrier until the plaintiff's demand has been adjudged upon full inquiry to be valid. In these circumstances the validity of the provision is not doubtful, but certain."

Mangnetto v. *Crankshaw*, 26 R. I. 453, 59 At. 309 (1904), gives effect to a state statute allowing a counsel fee to the opposing party when a demurrer is overruled. *Title 28, Section 824, United States Code Annotated*, provides that if any informer on a penal statute, to whom the penalty or any part thereof, if recovered, is directed to accrue, discontinues his suit or prosecution, or is nonsuited therein, or if upon trial judgment is rendered in favor of the defendant, such informer shall be liable to the clerk, marshal and attorney for the fees of such prosecution. *Title 28, Section 819, United States Code Annotated*, provides that if in any suit against officers making seizures under any act regulating duties on imports, the plaintiff is nonsuited, or judgment is passed against him, the defendant shall recover double costs. Statutes and court rules penalize the multiplication of proceedings in a cause, increasing costs unreasonably and vexatiously. *Title 28, Sections 825, 829, United States Code Annotated; Motion Picture Patents Co.* v. *Steiner*, 201 Fed. 63, 119 C. C. A. 401 (1912); Equity Rules 67, 76. Statutes are common imposing attorneys' fees upon or otherwise penalizing, parties taking frivolous appeals. *Wittenberg* v. *Fisher*, 183 Mo. App. 347, 166 S. W. 1106 (1914); *Syndicate Imp. Co.* v. *Bradley*, 6 Wyo. 171, 43 Pac. 79, 44 Pac. 60 (1896).

Attorneys' fees (in addition to the $20 fee provided by the Act of 1853) are also allowed the successful party

in patent and copyright infringement cases, under the laws of the United States. *Title 17, Section 40, United States Code Annotated; E. G. Staude Mfg. Co.* v. *Labombarbe,* 243 Fed. 362, 156 C. C. A. 142 (1917).

The foregoing American authorities indicate that in this country, as well as in England, a public policy in favor of the discouragement of and indemnification for litigation which is wholly baseless and unwarranted, justifies a court of equity in imposing solicitor and client costs upon parties offending in that behalf. The statutes, as a matter of course, cannot warrant any action not within their terms; but they certainly represent the extension of a principle already established by courts of equity under similar circumstances.

(c) The third type of case discussed by the Court of Appeals, in which the court considered the pertinent authorities to allow solicitor and client costs, concerned the fiduciary relationships of trustee and beneficiary, pledgor and pledgee, and principal and agent, where the fiduciary is put to expense, either in defending an unfounded suit, or in administering or protecting and preserving the trust or pledged property.

The Southern Company, in its brief supporting the application for certiorari, seeks to explain away all the numerous cases in this third classification, as follows (p. 32):

> "It is a general principle that the trust estate must bear the expenses of its administration. It is also a general principle that where one of many parties having a common interest in the trust fund, at his own expense takes proper proceedings to save it from destruction and to restore it to the purposes of the trust, he is entitled to reimbursement, either out of the fund itself or by a proportionate contribution from those who accept the benefit of his efforts.

> This rule, however, has, we contend, no application whatsoever to the present case."

The implication is that solicitor and client costs are payable only out of a fund, either held by an express trustee or recovered from a constructive trustee. The right to recover such costs is not, however, so limited.

A trustee, guilty of no misconduct and reasonably defending an action brought against him by the *cestui* to compel a conveyance of trust assets, is entitled to an allowance for attorneys' fees, payable out of the trust fund, if one be available. *Fleming* v. *Wilson*, 6 Bush (69 Ky.) 610 (1869); *Clark* v. *Anderson*, 13 Bush (76 Ky.) 111 (1877); *In re Starr*, 103 At. 392 (N. J.) (1918); *Biddle's Appeal*, 83 Pa. St. 340 (1877); *Lycan* v. *Miller*, 56 Mo. App. 79 (1894). He has this right, in the ordinary case, even though the *cestui* prevails in the litigation. *Darby* v. *Gilligan*, 37 W. Va. 59, 16 S. E. 507 (1892).

But if there be no fund out of which such an allowance can be paid, or if, though such a fund exists, the action by the *cestui* is wholly baseless and unwarranted, or recklessly brought, then the allowance of attorneys' fees to the trustee will be taxed as costs against the *cestui* personally. *Minuse* v. *Cox*, 5 Johns. Ch. 441 (1821); *Thome* v. *Allen*, 24 Ky. L. R. 987, 70 S. W. 410, 71 S. W. 431 (1903); *Turner* v. *Collins*, L. R. 12 Eq. Cas. 438 (1871). Or, in certain instances, the fees allowed will be taxed against the plaintiff's share of the trust estate. *Patterson* v. *Northern Trust Co.*, 286 Ill. 564, 122 N. E. 55 (1919); *In re Chenell*, L. R. 8 Ch. D. 492 (1877).

The rule is so stated in *Halsbury, Laws of England*, V. 28, p. 161:

> "And the *cestui que trust* or his solicitor may be ordered to bear the cost of the proceedings personally, if they have been commenced wrongfully or too hastily."

A similar statement appears in the three leading treatises on the law of trusts (two by American authors, and one English). In *Perry, Trusts and Trustees*, 7th Ed. (1929), V. 2, Sec. 894, it is said:

> "The general rule is, that trustees shall have their costs either out of the trust fund, or from the *cestuis que trust* personally (upon the principle that he should be reimbursed all the expenses to which he has been put without his own fault by reason of his being a trustee). If there is a fund within the control of the court, they may have their costs as between solicitor and client. Where there is no fund within control of the court, if the *cestuis que trust* bring the trustees before it to obtain a direction as to the rights of the parties, or the mode of administration, and the trustees are free from all blame or fault, they are entitled to costs against the *cestuis que trust* personally, to be taxed as between solicitor and client."

See also *Hill on Trustees*, (1867) p. 566, and *Lewin on Trusts*, 8th Ed. (1891), V. 3, p. 987, to the same effect.

In a proper suit by the *cestui que trust* against the trustee, to enforce the fiduciary obligation, whether the defendant be an express or constructive trustee, the prevailing *cestui* is entitled to solicitor and client costs. *In re Clark*, 174 Ia. 499, 154 N. W. 759 (1915); *Attorney General* v. *Old South Society*, 13 Allen 474 (1866); *McGaw* v. *Acker, Merrall and Condit Co.*, 111 Md. 153,

73 At. 731 (1909); *Woodworth* v. *Old Second National Bank*, 154 Mich. 459, 118 N. W. 581 (1908); *Madden* v. *Rosseter*, 192 N. Y. S. 113, 117 Misc. Rep. 244 (1921); *American National Bank* v. *Warner*, 176 S. W. 863 (Tex. Civ. App.) (1915).

In *McGaw* v. *Acker, Merrall and Condit Co.*, *Woodworth* v. *Old Second National Bank*, and *Madden* v. *Rosseter, supra*, the allowance was not out of any fund in the hands of the trustee, or of the court, but was imposed personally against the trustee, over and above and in addition to his obligation as a fiduciary.

Cases of the type referred to by the Southern Company, where one who recovers or preserves a fund for the benefit of himself and others is held entitled to an allowance of attorneys' fees out of the fund, are quite numerous. *Trustees* v. *Greenough*, 105 U. S. 527 (1881), is the leading case. There are many other cases of the same type, mostly creditors' and stockholders' bills, a late decision being *Hutchinson Box Board & Paper Co.* v. *Van Horn*, 299 Fed. 424 (C. C. A. 8th Cir.) (1924).

A fund is recovered or preserved in such cases, and attorneys' fees are paid out of the fund. But the existence of the fund, as such, is not the basis of the court's power to award the fees. There is no magic in the word "fund." The mere fact that there is a fund does not empower a court to pay attorneys' fees out of it. The allowance of attorneys' fees in such cases is justified on the ground that the plaintiff, in recovering or preserving the fund, is acting in a fiduciary capacity toward those entitled to share in the fund. That this is the real basis of the doctrine is clearly indicated by the following excerpt from the opinion in *Trustees* v. *Greenough, supra:*

> "As to the point made by the appellants, that the complainant is only a creditor, seeking satisfaction

of his debt, and cannot be regarded in the light of a trustee, and therefore is not entitled to an allowance for any expenses or counsel fees beyond taxed costs as between party and party, a great deal may be said. In ordinary cases the position of the appellants may be correct. But in a case like the present, where the bill was filed not only in behalf of the complainant himself, but in behalf of the other bondholders having an equal interest in the fund; and where the bill sought to rescue that fund from waste and destruction arising from the neglect and misconduct of the trustees, and to bring it into court for administration according to the purposes of the trust; and where all this has been done; and done at great expense and trouble on the part of the complainant; and the other bondholders have come in and participated in the benefits resulting from his proceedings—if the complainant is not a trustee, he has at least acted the part of a trustee in relation to the common interest. He may be said to have saved the fund for the *cestuis que trust*, and to have secured its proper application to their use."

It is to be observed that the term "fund," as used in the foregoing cases, does not refer to a fund in the hands of the court, or a fund being administered by the court. It is a fund in the possession of the defendant. Indeed, in many of the cases, there is no "fund" at all, in the ordinary sense. No particular property is sought to be recovered in many stockholders' and creditors' bills, but a money judgment is asked, and obtained, against defaulting directors or parties to whom property has been conveyed in fraud of creditors. To be sure, the liability of the defendant is, in a sense, a fund, in that it is realized upon for the benefit of the corporation or the creditors. But in none of these cases is there any estate in the process of administration by the court.

There are cases where a fund is in court, in process of administration. Instance the partition cases, and the receivership proceedings and the mortgage foreclosure cases. In all of these, attorneys' fees may be, and in regular course are, allowed, payable out of the fund in court. But the court's power to make the allowance does not grow out of or depend upon the existence of the fund.

In suits to construe or establish wills, brought by trustees or executors, there is, or may be, no fund of any kind in court; yet attorneys' fees are properly allowed and taxed as costs in such cases. *Williams* v. *MacDougall*, 39 Cal. 80 (1870); *Abbott* v. *Bradstreet*, 3 Allen 587 (1862); *Drew* v. *Wakefield*, 54 Me. 291 (1866); *In re* Neil's Will, 172 N. Y. S. 79, 184 App. Div. 507; *Re Davies; Jenkins* v. *Davies*, 64 L. T. R. 824 (1891); Perry, Trusts and Trustees, 7th Ed. (1929), Vol. 2, Sec. 891. The power of the court to award attorneys' fees in all the foregoing types of cases, is an incident of the control of a court of equity over trusts and of its jurisdiction to protect and indemnify trustees. In all of the cases mentioned, the party to whom the award was made was acting in a fidudiary capacity.

Attorneys' fees to the petitioning creditors in involuntary bankruptcy are allowed on the same theory. *In re Mead*, 16 Fed. Cas. No. 9364 (1871); *Ex parte Jaffray*, 13 Fed. Cas. No. 7170 (1869). (These cases arose under the Bankruptcy Act of 1867, which contained no provision for such fees.) Likewise, attorneys' fees incurred by an assignee for creditors are a proper charge in his favor. *Randolph* v. *Scruggs*, 190 U. S. 533, 23 S. Ct. 710 (1902); *Bramble* v. *Brett*, 230 Fed. 385, 144 C. C. A. 527 (1916); *In re Stewart*, 179 Fed. 222, 102 C. C. A. 348 (1910).

The plaintiff in an interpleader suit is entitled to such an allowance. *Louisiana State Lottery Co.* v. *Clark*, 16 Fed. 20 (1883). Also an heir successfully resisting the allowance of a claim against the decedent's estate. *Koelble* v. *Runyan*, 158 N. E. 179 (Ohio) (1927). Likewise an heir, and an administrator, setting aside fraudulent conveyances by the decedent. *Niday* v. *Graef*, 279 Fed. 941 (C. A. C., 9th Cir.) (1922); *Harrison* v. *Perea*, 168 U. S. 311, 18 S. Ct. 129 (1897). And a creditor successfully resisting the claim of a mortgagee to the proceeds of a vessel sold in a mechanic's lien suit. *Shannon* v. *Angelique*, 21 Fed. Cas. No. 12, 705 (1856). A partial assignee of a claim suing to adjust rights between himself and a subsequent assignee is entitled to attorneys' fees out of the proceeds of the claim. *Pickett & Sexton* v. *School District of Kansas City*, 193 Mo. App. 519, 186 S. W. 533 (1916).

Taxpayers who bring a bill to enjoin a municipality from paying a void note, are allowed their counsel fees, taxed as costs. *Frost* v. *Inhabitants of Belmont*, 6 Allen 152 (1863). An attaching creditor whose lien, on the subsequent bankruptcy of the debtor, is preserved for the benefit of the estate, is entitled to an allowance for attorneys' fees. *Receivers of Virginia Iron, Coal & Coke Co.* v. *Staake*, 133 Fed. 717, 66 C. C. A. 547 (1904). In a suit by a surviving partner against the widow and heirs of the deceased partner, for an accounting, attorneys' fees are allowable. *Patrick* v. *Patrick*, 71 N. J. E. 347, 63 At. 848 (1906).

In all the foregoing cases a fiduciary relation exists or is enforced. One party, though generally acting in his own interest as well, at the same time acts as trustee for others. If he performs that office properly, he will not be penalized and put out of pocket by being compelled to pay the cost of the litigation.

From the foregoing discussion it is apparent that the authorities fully sustain the power of the court to tax costs as between solicitor and client in the third type of case considered by the Court of Appeals.

We wish to cite, in addition, on the right to such costs in general, the following:

Canter v. *American & Ocean Ins. Co.*, 3 Pet. 307 (1830).

Beames, Costs in Equity (2d Ed.) (1840), Chap. 10.

Barbour, The Practice of the Court of Chancery (2d ed.) (1875), V. 2, pp. 336-339.

Daniell, Chancery Practice (1st Ed.) (1837), Sec. 4, Chap. 27.

Smith, Chancery Practice (2d Ed.) (1837), V. 1, pp. 697-700.

Street, Federal Equity Practice (1909), V. 2, Sec. 2040.

Turner, Practice and Costs in the High Court of Chancery (3d Ed.) 1804).

The treatises cited discuss the taxation of solicitor and client costs, both in this country and in England. The authoritative nature of the books by Daniell and Smith are well indicated by the following note by this court in *Thomson* v. *Wooster*, 114 U. S. 104 (1884):

> "Reference is made to the 1st edition of Daniell (pub. 1837) as being, with the 2d edition of Smith's Practice (published the same year), the most authoritative work on English Chancery Practice in use in March, 1842, when our Equity Rules were adopted. Supplemented by the General Orders made by Lords Cottenham and Langdale in August, 1841 (many of which were closely copied in our own Rules), they exhibit that 'present practice of the High Court of Chancery in England,' which by our 90th Rule was

> adopted as the standard of equity practice in cases where the Rules prescribed by this court, or by the Circuit Court, do not apply."

Beames, Costs in Equity, *supra*, is relied upon in many of the cases heretofore referred to. In *Goodyear* v. *Sawyer*, 17 Fed. 2 (1883), the author is spoken of as "Mr. Beames, who wrote a little before our equity rules were promulgated of the practice as it was then understood."

There are, in addition, a number of cases which, by analogy, bear upon the issue. In *Burns* v. *Rosenstein*, 135 U. S. 449 (1890), though no statutory authority existed therefor, expense incurred by the plaintiff in preserving attached property, was taxed as costs in plaintiff's favor in a suit for an accounting between partners. This court said:

> "The allegations of the original bill justified the issuing of the attachment. It was right that the property taken under it should be cared for, and as the court found that the plaintiffs were entitled to a decree against the defendants, a judgment for costs properly followed; and we perceive no reason why the plaintiffs should not have been allowed, as part of their costs, a reasonable amount for the expenses incurred in preserving the attached property, and for which they became primarily liable to the officer keeping it."

In re Peterson, 253 U. S. 300, 40 S. Ct. 543 (1919), taxed as costs the compensation of an auditor, though no statute or rule of court made provision therefor. Premiums paid on surety bonds of various kinds have been taxed as costs. *Newton* v. *Consolidated Gas Co.*, 265 U. S. 78, 44 S. Ct. 481 (1923); *The Walter Adams*, 271

Fed. 358 (1921); *The Hurtsdale*, 171 Fed. 607 (1909); *The John D. Dailey*, 158 Fed. 642 (1907); *Jacobsen* v. *Lewis Klondike Expedition Co.*, 112 Fed. 73, 50 C. C. A. 12 (1901); *The South Portland*, 95 Fed. 295 (1899). In *Western Union Telegraph Co.* v. *Louisville & N. R. Co.*, 208 Fed. 581 (1913), a docket fee of $10 was allowed to plaintiff's attorney on the remanding of a cause to the state court after a wrongful removal; and in *Kaempfer* v. *Taylor*, 78 Fed. 795 (1897), a solicitor's docket fee of $5 was allowed upon a discontinuance. In neither case was there any statutory authority for the allowance.

Cases may of course be found where a requested allowance of attorneys' fees has been denied. This is to be expected, since such an allowance is discretionary, and should be made only in special cases. Most of the cases cited in the brief of the Southern Company, in which solicitor and client costs have been denied, are not at all in opposition to the Trust Company's position. Many of those cases are actions at law, in which admittedly there is no right to allow such costs. *Arcambel* v. *Wiseman*, 3 Dall. 306 (1796), holds that counsel fees cannot be allowed as a part of the damages (apparently on an injunction bond). *Day* v. *Woodworth*, 13 How. 363 (1851), is an action at law for trespass.

(d) The present state of the law upon these three points may be, therefore, summarized as follows:

As to point (a), the English authorities sustain the power of the court in equity cases to tax solicitor and client costs. In the absence of American cases to the contrary, it would seem that the English rule should prevail in the Federal Courts.

As to points (b) and (c), there are ample American authorities to support the principles laid down by the Circuit Court of Appeals.

If this be true, the decree of the Circuit Court of Appeals should be affirmed and the decree of the District Court reversed, for the only question passed upon by the trial court was as to its *power* to act. The case should be remanded with instructions to the trial court to exercise that power in accordance with the rules and practise in equity. There seems to be no doubt that the District Court believed that the facts of the present litigation brought it within the terms of the principle, if the court had the power to apply the principle.

What are those facts?

VI.

Were gross charges of fraud and misconduct made?

The answer to this question is to be found in the bills filed by the Southern Company and by those who were acting in its behalf in the litigation. Only a reading of the bills can give a true picture of the accusations and innuendoes with which they are made up. A few references will suffice to disclose their general character.

The intervening petition of the Southern Company, after alleging the absolute dominion and control by the Trust Company of the acts of the Belt Company and its subsidiaries and associated companies, alleged that the plan and purpose of the Trust Company was to "gather unto the Trust Company all the profits and other advantages," and to "*foist* upon the said railroad companies so utilized any and all losses, burdens or other liabilities" (Rec. V. II, p. 174); that the Trust Company used these companies for its own interests and for its own benefit and advantage instead of their own (Rec. V. II, p. 175); that it took and converted to its own use stocks and bonds belonging to the Belt Company valued at approximately

$870,000 (Rec. V. II, pp. 179-180); that it did not use its control of the Belt Company for the benefit of the stockholders and bondholders of the Belt Company, but for its own interest and in the same manner used its position as trustee under the Belt mortgage "in violation of its trust" (Rec. V. II, p. 182); that "in violation of its duty as trustee in said mortgage and with a view of appropriating to itself whatever of value there was remaining in the possession of said companies," it "contrived the plan of requiring said companies to turn over to it all of the personal property owned by said companies of every nature and description" (Rec. V. II, p. 182); that it caused the Belt Company to pretend to hold a directors' meeting for this purpose (Rec. V. II, p. 183); and that it used its knowledge of the Belt Company to its own advantage "all in violation of its duties as trustee." (Rec. V. I, p. 184.)

It may be that, as stated in petitioner's last brief (p. 11), these allegations charge something "in the nature of constructive fraud." But we respectfully submit that more than a "constructive" fraud is charged when a trustee is alleged to have "foisted" upon others losses, burdens and liabilities which are in fact his own; to have taken and converted to his own use the property of others to the amount of $870,000; to have "appropriated" to himself all the remaining assets of corporations alleged to be in his control, by "contriving" a plan and causing "pretended" directors' meetings to be held; to have misused the knowledge obtained by him as trustee; and all for his own advantage and in violation of his trust. One may be guilty of a "constructive" fraud when he innocently does something forbidden by law. But one cannot *constructively* have a "plan and purpose" (Rec. V. II, p. 173) to "foist" his own debts upon another; he cannot *con-*

structively cause things to be done for his own benefit and advantage; he cannot *constructively* "contrive" to "appropriate" to himself the property of others; he cannot *constructively* "pretend" to hold directors' meetings; he cannot *constructively* misuse knowledge obtained by him as trustee.

We submit that no graver charge can be made against a man than to assert that as trustee he has contrived to misuse his position to his own benefit and to the detriment of his trust. Here is no constructive fraud. It is as if one should charge a court of exercising its functions for its own ends rather than in the interests of the litigants for whom the court holds its power in trust. No relationship has been so jealously guarded by the law as that between trustee and *cestui que trust*.

In its amended petition the Southern Company, for good measure, charges that the Trust Company "unlawfully and improperly" used the proceeds of bonds sold by it as trustee, "wrongfully and unlawfully" refused to use the proceeds properly, and even sold bonds after the railroads were completed and the occasion for such sale had passed, appropriating to itself the avails of such transactions. (Rec. V. II, p. 289.)

So much for the petitions filed directly by the Southern Company. It should be remembered, however, that the Court of Appeals has held upon a former appeal—and was clearly justified in so holding—that the original bill filed by the Cambria Company in this cause was, in effect, the bill of the Southern Company and that the ancillary bill filed by the Belt Company and all the amended and supplemental bills filed by it were filed on behalf and at the instance of the Southern Company. We may properly, therefore, look into these pleadings also in ascertaining what the character of the litigation was.

Even more numerous and more exaggerated were the charges in these bills to the effect that the Trust Company was guilty of active fraud and intentional breach of trust. Some of the allegations are in the exact language used in the Southern Company's petition. (For example, see: Rec. V. II, pp. 5-6.) But there were many others. It was asserted that the Trust Company received $4,000,000 of securities of the Union Company, and accounted for only $865,000 thereof (Rec. V. II, p. 9); that it received $850,000 of securities of the Air Line, and accounted for only $200,000 thereof (Rec. V. II, p. 9); that the Trust Company "went through the form of giving said Belt Company credit" (Rec. V. II, p. 11; "that the act of said Trust Company in undertaking to charge the said loss (on the Connecting Company road) to the said Belt Company * * * was, as to the creditors of the said Belt Company, fraudulent in fact and in law" (Rec. V. II, p. 12); that the Trust Company failed to account for $1,000,000 of securities of the Suburban Company (Rec. V. II, p. 100), $750,000 of securities of the Consolidated Company (Rec. V. II, p. 101), $2,000,000 of securities of the Union Company (Rec. V. II, p. 102), and $800,000 of securities of the Air Line (Rec. V. II, p. 103); that the Trust Company "took out of the earnings and assets of said Belt Company, large sums of money which it pretended to expend for and on behalf of said Belt Company" (Rec. V. II, p. 105); that the Belt Company furnished the Trust Company large sums of money for the purchase of property, for which the Trust Company never accounted (Rec. V. 2, pp. 105-108); that the Trust Company "devised a plan or scheme to resell and unload upon the Belt Company" certain second mortgage Air Line bonds, and "to carry out said plan, caused the Belt Company to enter into a pretended agreement" and

"caused entries to be made upon its books and upon the books of the Belt Company" charging the Belt Company with said bonds (Rec. V. II, p. 252); "that it was the habit and practice of the Trust Company, in the disposition of bonds and stocks of the Belt Company, the Consolidated Company, the Air Line and the Union Company, to make sales of said bonds and stocks at such prices as the Trust Company should decide upon, and then when such sales had been made to credit the Belt Company with a less amount, representing to the Belt Company that the sale so made by the Trust Company as aforesaid, had been made at and for a much less price than the amount or rate at which the sale had actually been made." (Rec. V. II, p. 256.)

All of the bills bristle with similar charges of active misconduct. They contain little else. We dislike to burden the brief with too much detail. But in view of the contention seriously made that only constructive fraud was alleged, we feel constrained to point out some of the more striking allegations of these pleadings which cover more than two hundred pages of the printed record. The charges are repeated in all the bills and hardly a page can be found which does not contain such words as "pretended indebtedness," "pretended notes," "pretended purpose," "go through the form," "contrive a scheme," "appropriate to itself," and innumerable allegations of intentional conversion, falsification of accounts and acts practically amounting to embezzlement. Even a cursory glance through these pages will convince the court that the pleader had no thought of a mere constructive fraud.

Whether or not this court shall say that the federal courts of equity have the power, established in the English Court of Chancery, to tax solicitor and client costs in cases of gross and unsustained charges of fraud,

it would seem impossible for the court to say that gross fraud was not charged.

VII.

Was the main ground of the suit false, unjust, vexatious, wanton or oppressive?

That the main ground of the suit was false and unjust —that is to say, utterly without equity—sufficiently appears from the report of the master itself and from the action of the Circuit Court of Appeals on the former appeals. The master does not say in words that the suit was baseless, but he does say in his report, under the heading, "A Few Controlling Facts," that

> *"There either appear on the face of the bill, or are practically undisputed in the proofs, the following facts which serve to materially distinguish the case at bar from any cited by learned counsel in support of the complaints in the bill."* (Rec. V. II, p. 647.)

He then recites in substance (a) that the action was instituted on behalf of a creditor who became such long after the transactions complained of and that no creditor was before the court whose claim existed before such time; (b) that no excuse was attempted for the long delay in seeking an accounting; (c) that no stockholder had ever complained; (d) that the sole stockholder, when the bill was filed, was the Southern Company which had acquired all the Belt stock in the execution of a plan of reorganization; (e) that no stockholder had been named in the record who, if ignorant of the transactions, did not participate or acquiesce in or approve them; (f) that the transactions were open, not secret and concealed, and

were known or might readily have been known to the stockholders, as they were large transactions, spread over a long period of time, and were set forth in much detail both on the books of the Trust Company and on those of the Belt Company; (g) that the transactions were expressly ratified by the stockholders.

He further recites (h) that the statute of limitations had run against the transactions; (i) that they were fully executed years before the bill was filed and the accounts settled from time to time, the Belt Company giving notes for the balances due; (j) that the bookkeeping was full, complete and accurate, and the accounts were regularly stated and audited; (k) that the Belt stockholders repeatedly re-elected the same directors, this being the strongest evidence of acquiescence on their part in the management, which is now for the first time attacked; (l) that the Belt Company had received benefits and advantages from the transactions which the complainants never offered to return and could not return, and that no fraudulent intent or actual fraud on the part of the Trust Company was shown; (m) that *neither the Trust Company nor the directors in question ever at any time held even a substantial minority of the stock of the Belt Company, so that there was no basis for the charge of "domination."* (Rec. V. II, pp. 647-649.)

This report, confirmed by the District Court, and made the basis of the action of the Circuit Court of Appeals, justifies us in affirming that the suit has been judicially determined to be baseless and unwarranted.

Was it also vexatious, wanton and oppressive? The answer to this question should be found, and may be found, not in any independent proofs, offered by the Southern Company as to its good faith, but in the pleadings, the circumstances under which the suit was filed

and the procedure adopted by the complainants. They speak for themselves.

(a) The circumstances.

First, as to the circumstances. In March, 1900, the Southern Company was formed, by interests hostile to the Trust Company. It bought at foreclosure sale the property of the Gulf Company. It acquired, by deposits made under the Reorganization Plan, substanitally all the stock and bonds of the Belt Company. After April 1, 1900, the Belt Company was but an arm of the Southern Company.

The Belt Company was indebted to the Trust Company on promissory notes executed by it in the face amount of $360,000, on which approximately $400,000 was due. There is not, and never was, the slighest doubt as to the genuineness of that indebtedness. The Belt Company books showed that amount to be due. Prior to the filing of the Cambria bill, no intimation had been made by anyone that the Belt notes were not genuine. In the 36,000 pages of testimony before the Master there was no evidence, nor was there any attempt to introduce evidence, attacking the validity of these notes. The offer of the Southern Company to introduce evidence of good faith in instituting the litigation (Rec. V. 1, p. 33), contained not the slightest suggestion that these Belt notes were not real, bona fide obligations, representing an actual indebtedness, due and unpaid.

The Trust Company held a large amount of collateral to this debt, described in the bill of the Cambria Company (Rec. V. II, pp. 14-15) and elsewhere in the record. It consisted chiefly of stocks and bonds of subsidiary companies which owned properties and possessed rights

essential or important to the Belt System. It would be an advantageous thing to the Southern Company if the Belt assets could be freed from this debt and the collateral or the properties of the companies whose stock and bonds were pledged, secured by the Southern Company at the lowest possible cost. The Belt assets were subject to mortgages, the foreclosure of which might—and very nearly did—put these assets in the hands of the Southern Company without payment of any debts. The stocks, bonds and properties of the subsidiaries presented a more troublesome question.

On September 1, 1900, the Trust Company gave notice that it would on September 7 proceed to sell, under the terms of the pledge, the securities held by it. On September 6, 1900, the day before the proposed sale, six suits were filed to carry out the purpose of the Southern Company. Four foreclosure suits were filed, covering constituent parts of the Belt System, in which receivers were on the same day appointed for the mortgaged property. The Cambria Company filed its suit against the Belt Company, got judgment, had execution issued and returned unsatisfied, all on September 6, 1900, and on the same day filed its creditor's bill, the beginning of the present litigation, against the Trust Company, the Belt Company and its subsidiaries, asking that the sale of the collateral be enjoined. On the same day the injunction was granted, without notice to the Trust Company, and the receivership created in the foreclosure suits was extended over all the assets of the Belt Company generally.

If these suits could be brought to a successful termination, the purpose of the Southern Company would be accomplished. And it required some such suits to accomplish that purpose. A mere contest of the three items

which counsel say were erroneously charged to the Belt Company and therefore justify the litigation, would still have left substantially all the debt to the Trust Company unpaid and the collateral still liable to sale. It was necessary to attack the entire debt and a means was sought for such attack.

An accounting suit by the Belt Company was considered and it is said that a petition was prepared in August, 1900. But it was not filed and no explanation of the change in plan is offered. It may well be considered whether the reason was not that in such a suit no receivership was possible, whereas the Southern Company, desiring to overwhelm the Trust Company with litigation, desired to bring about all the receiverships possible. Certainly the statement, coming from the Southern Company, goes far to substantiate, if substantiation be necessary, the conclusion of the Circuit Court of Appeals that "it is difficult to wink so hard as not to see that the Cambria suit was in reality the suit of the Southern Company" (210 Fed. 717). For instead of the accounting suit, a creditor's bill was shortly filed in the name of the Cambria Company, in which the first act was the appointment of receivers for the Belt Company, to be followed by the appointment of receivers for the Belt subsidiaries.

In its offer of proof as to its good faith, the Southern Company says:

> "Thereupon counsel for your petitioner and for the Belt Company advised the officers of the Cambria Company, which was then a creditor of the Belt Company in a large amount, of the situation as it then existed and pointed out to them certain assets of the Belt Company, then held as collateral by the Trust Company, which would be released and become subject to the demands of creditors if an accounting

> between the Belt Company and the Trust Company were had and should result in substantially reducing or altogether wiping out said alleged indebtedness of the Belt Company to the Trust Company."

In other words, the Southern Company now confesses that it induced a creditor of the Belt Company to obtain judgment against it and proceed by creditor's bill to have receivers appointed.

But though the Cambria Company was willing to be induced to file this bill at the instance of the Southern Company, it was apparently unwilling to undertake the expense and incur the fees incident to the taking of a complete account. An ancillary bill was therefore filed on behalf of the receivers of the Belt Company, a then partner of the counsel for the Southern Company signing the bill as attorney for the receivers. Later replications were filed by the receivers, signed by the firm of which both these lawyers were members. (Rec., V. II, pp. 113, 159, 160.)

On February 2, 1905, the Cambria Company withdraws from active participation in the case, leaving the accounting for which it had asked in its brief wholly in the hands of the Belt Company, its attorney stating that the Cambria Company is practically "out of it until this accounting is all ended." (Rec., V. II, p. 940.) On February 27, 1905, the Southern Company comes into the case. On March 22, 1905, the Belt receivers file an amended and supplemental bill, signed by the counsel of the Southern Company. On May 1, 1905, the Southern Company files an amended intervening petition. On July 6, 1906, said receivers file a second amended and supplemental bill, again by the counsel of the Southern Company.

What was the purpose of all this litigation? The Cambria Company was a creditor of the Belt Company and its claim was undisputed. The latter never contested either suit brought by the former and, indeed, suggested the filing of the suit. The plan of reorganization provided for the payment of floating debts of the Belt Company in a large amount, which must have included this acknowledged obligation. The Cambria Company needed no creditor's bill or accounting to obtain its money, and it knew it. The suits were filed at the instance and for the accommodation of its friend, the Southern Company. They were not brought in good faith to obtain the relief asked for in their bills.

Nor was there any occasion for the foreclosure suits against the Belt properties. The Southern Company held substantially all the stock and bonds of the Belt Company, and the foreclosure decree and sale was, as held by the Circuit Court of Appeals on the former appeal (210 Fed. 704), "in effect by itself as trustee to itself as trustee." These suits were not brought in good faith to obtain the relief asked for therein.

Then the Belt receivers, acting either through the attorneys of the Southern Company or their associates, filed three successive bills, which could be of no possible benefit to anyone except the Southern Company. The creditors of the Belt Company, except the Trust Company, were provided for and the Southern Company was practically the only stockholder. Evidently, the counsel of the Southern Company, having thought it unwise to file an accounting suit against the Trust Company in August, 1900, decided in November, 1901, that the time had come for the application of more pressure.

At last, in 1905, the Southern Company intervened in person and the real purpose of the litigation comes to

light. The Southern Company claims title to all the valuable part of the pledged assets, free from the debt to the Trust Company. There can be no possible doubt that this was the intent from the beginning—to obtain the pledged Belt assets without paying the Trust Company debt. The suit of the Cambria Company, induced by the Southern Company, and called by the Circuit Court of Appeals "the baseless suit of the Cambria Company, a suit based on a judgment to which the Southern Company consented in the name of the Belt Company"—that suit appears as a mere club, used by the Southern Company to keep the Trust Company from enforcing its rights. And the bills for accounting become mere attempts to smother the Trust Company under the weight of ruinous expenses into an abandonment of those rights.

(b) The pleadings.

We submit further that the pleadings themselves conclusively establish the vexatious, wanton and oppressive character of the litigation.

After months of examination by auditors of the books of the Belt Company, the Southern Company induced a creditor to file a bill, demanding an accounting as to all transactions between the Belt Company and the Trust Company, based upon charges of domination and fraud. The creditor chosen was one whose claim had arisen long after the transactions complained of, who had no right to impeach such transactions, as is well understood.

> *Graham* v. *Railroad Co.*, 102 U. S. 148, 153.
> *Porter* v. *Steel Co.*, 120 U. S. 649, 673.

The transactions complained of were not only fully executed before the claim arose, but any claims there-

under were barred by the statute of limitations. The accounting demanded by the creditor was of accounts fully, completely and accurately kept by both parties, and accurately settled from time to time. And the domination and control, which furnish so large a part of the alleged equity of the Cambria bills, is charged against a stockholder who "never at any time held even a substantial minority of the stock of the Belt Company."

The bill was filed, evidently on information furnished by the Southern Company, with all the books of the Belt Company available and thoroughly examined, in spite of the fact that those books showed complete settlement of accounts and a patent absence of any power to control or dominate. Under such circumstances, are we not justified in saying that there was an ulterior motive?

The bills of the Belt receivers are made by the same pattern. They are based on transactions fully executed years previously, ratified by the stockholders and participated or acquiesced in by them; open, not secret; well known, not concealed; spread over a long period of time and set forth on the books in detail; and they were barred by the statute of limitations. The accounts attacked were fully and accurately kept and shown on the books of the Belt Company, and had been settled time and again. The various accusations of domination were directed against a small minority stockholder. The Belt Company had received large benefits from the attacked transactions, but there was no offer to return any part of them. And the books of the Belt Company, in the possession of the receivers or the Southern Company and examined for months, contained the evidence of the falseness of the charges.

No one can reasonably doubt that the Southern Company examined and re-examined those books in an en-

deavor to find grounds for contesting the Trust Company's debt and pledge; that it was utterly unable to find any such grounds within the term of the statute of limitations that would even sustain an argument; that it thereupon went back to the early history of the companies, their organization, the issuance and sale of bonds, their construction contracts—not with the idea of recovering upon an outlawed transaction, but with the purpose of drawing the Trust Company into a ruinous contest.

Evidence may be abundant to show that the various defendant companies were co-operating, that they were all engaged on different parts of the same plan, that there were many transactions between them, that all agreed to what each was doing and each did what the others desired and approved. But this is far from domination or control. It is self-evident, as the master found, that the holder of a small minority of stock, such as the Trust Company was known to be, cannot be guilty of unlawful domination.

The Southern Company, in its last brief, refers to two items that "afforded ample justification for the proceeding" (p. 67): The DeGoeijen item and the Stilwell contract item. The master found in favor of the Trust Company on both items, and the correctness of his finding is not before the court. We understand that the items are referred to in the brief only as proof that the attack upon them was not vexatious. Let us examine these examples, which the Southern Company has picked out as justifying its course.

The findings and conclusions of the master are set out on pages 682 to 694 of Volume II of the Record. The facts are somewhat complicated, but it sufficiently appears that about October, 1897, DeGoeijen purchased of the Belt Company a large amount of bonds for which

he did not pay in cash. The Trust Company was requested to handle the collection from him, and for convenience credited the Belt Company with the full amount on its books and charged against the account subsequent collections made from DeGoeijen. By March 31, 1899, the amount had been reduced to $89,333.33. The agreement between the Belt Company and the Trust Company, was that the latter should pay over to the former only such amounts as were paid by DeGoeijen. As the account was very slow, the Trust Company charged it back to the Belt Company in March, 1899.

If this were the whole story, the point might be well taken that the item deserved investigation. But it is not the whole story. This charge was on the Belt Company books when they were examined by the Southern Company in 1900, and was then known to the Southern Company. It was, however, not included in the charges of the Cambria bill. It does not appear in the ancillary bill filed by the Belt receivers in 1901. It appears for the first time in the amended and supplemental ancillary bill filed in 1905.

The reason for this, as shown by the report, is most enlightening. It seems that in 1899, DeGoeijen filed a claim for a large amount in the Gulf foreclosure suit and that thereafter the reorganization committee and the Southern Company were negotiating a settlement. This settlement involved also the $89,333.33 item, as a claim of the Belt Company against DeGoeijen. In 1900, an adjustment was agreed upon, and in 1902 *the Southern Company and the reorganization committee released DeGoeijen from the debt.* The master says that "the reorganization committee had been more or less pursuing DeGoeijen on this $89,333.33 claim most of the time since it was organized."

He further says: "Stuart R. Knott, then president of these companies (the Southern and the Belt), and who signed the release on behalf of the Southern, was one of the then receivers of the Belt, and a complainant in this cause."

As a final light on this subject, the master says:

> "The Belt Company, having regularly collected interest on these notes from DeGoeijen (Rec. 50-30317), and having shown on its books and on the stated financial reports of the company, that this item of $89,333.33 was due from DeGoeijen (Vol. 51-30785), and DeGoeijen having at all times recognized the obligation, and the Belt Company and its receiver, having, through the reorganization committee, collected, or made a settlement of some kind with DeGoeijen in reference to the matter, it would seem that the complainant is not in condition to now assert that the Trust Company is its debtor on account of said item of $89,333.33, for, in doing the things last mentioned, the Belt Company has placed a construction upon the transaction which shows that it treated DeGoeijen as its debtor, and not the Trust Company."

Now we have the whole story. The Belt Company treated the debt as due to it from DeGoeijen on its books and on its statements, collected interest on it, used it as an offset in settling a claim by DeGoeijen against the Gulf Company (predecessor of the Southern), and then released it, the president of the Southern Company who was one of the Belt receivers signing the release. This was in 1902. Yet in 1905, after having practically collected the debt from DeGoeijen, the Belt receivers set it up as a debt owed by the Trust Company.

And the Southern Company now contends that the charge was not vexatious.

The Stilwell contract item is still less convincing. It is one of the musty items evidencing the diligence of the Southern Company in digging into ancient volumes and the extremity to which it was obliged to go in search of a plausible cause of action. The findings of the master upon this transaction are to be found on pages 649 to 671 of Volume II of the record.

This Stilwell contract was one of the original construction contracts for a portion of the railroad of the Suburban Company, a predecessor of the Belt Company. It was made in 1889, and in 1890 the Suburban Company, though the portion was not completed, accepted an offer to turn over to it the road and materials as they then were at the contract price. This acceptance was authorized at a stockholders' meeting of the Suburban Company, May 9, 1890. Thereafter, for a period of almost fifteen years, no stockholder or creditor or other person raised the slightest question with regard to this settlement, and it stood openly spread upon the records of the Suburban Company, approved and acquiesced in by every interested party.

It remained for the receivers of the Belt Company, at the instance of the Southern Company and through its attorneys, in a suit collusively filed by a creditor whose claim arose years after the transaction was fully completed and closed, to allege in their amended ancillary bill, filed on March 22, 1905, for the first time, that the settlement was fraudulent and should be set aside.

Counsel for the Southern Company ask: "Will anyone for a moment contend that an action brought to compel restitution under these circumstances was trivial, insincere or vexatious?" We unhesitatingly answer yes, if the following circumstances also appear; that the settlement was open and spread on the records of the company;

that it was acquiesced in for fifteen years; that it was an executed transaction closed for so many years that the statutory period had run against it; that the stockholders had expressly ratified it; that no stockholder and no contemporary creditor had objected at any time; that the sole stockholder at the time the action was brought, the Southern Company, had obtained the stock under the terms of a reorganization agreement ten years after the questioned settlement; that the demand for restitution was made without any offer to restore the consideration received; and that the restitution was demanded upon the ground of "control and domination" for which there was not the slightest basis in fact.

In the lower court, the Southern Company relied upon three other items as constituting the justification of its good faith—the three items as to which the master found in favor of the Southern Company. These are referred to on page 15 of its last brief, but apparently are not now urged in that brief as evidence of anything. There is good reason for this. For, as pointed out in our brief in the Circuit Court of Appeals, two of these items concerned events occurring after the filing of the original bill herein, and under circumstances which clearly indicated that they were proper charges against the Belt Company when made, but afterwards were settled by the Belt Company. The Trust Company admitted in its answer that they should be deducted from its debt.

The facts as to these items will be found: as to the $5,600.00 item, on page 365, Record II; and as to the $5,000.00 item, on pages 365-6. The remaining item of $11,250.00 arose in connection with certain Union Terminal Company coupons due August 1, 1899, which were at that time charged to the Belt Company. These coupons were paid by the reorganization committee in July,

1900, and through some error credit was not given. The record does not show how this error occurred (Rec., V. II, 726-7).

We have, then, as the net result, one error, occurring in July, 1900, readily subject to adjustment without suit, and involving a matter of only $11,250.00, which is relied upon as a justification of an accounting, going back at least to 1887, bringing in thousands of accounts and items, charging fraud and fraudulent misuse of funds, and causing ten years of ruinous litigation. It is as if a surgeon should excuse his attempt to amputate a leg by finding a splinter embedded in the flesh.

In view of the foregoing, the Trust Company might safely admit, notwithstanding a mass of unfounded charges made therein, that the Southern Company's petitions, standing alone and unconnected with the previous proceedings, do not on their face show a wanton and vexatious attack. They were, in the main, a direct attack upon the title of the pledgor Belt Company to the pledged property. As found by the master, *"the intervener asserts its claim to be the equitable owner of all said collateral securities as against all parties to this suit."* (Rec. II, pp. 735-6.) They assert, with some degree of plausibility, an equitable claim to certain properties standing in the name of the Central Improvement Company, again indirectly attacking the title of the pledgor. And, based upon these equitable claims, they make certain charges against the Trust Company as trustee under various corporate mortgages. As to some of the Central Company's properties, the decree of the District Court was for the Southern Company, which was reversed upon the point by the Circuit Court of Appeals on the former appeal.

But these petitions do not stand alone. The Circuit Court of Appeals, upon the former appeal, found that the Cambria bill was filed at the instance and for the benefit of the Southern Company, and the facts hereinbefore set out amply sustain that finding. The original and amended bills of the Belt receivers were instigated and fathered by the Southern Company, and it was the sole party in interest so far as those bills were concerned. That company did not simply intervene in the suit in 1905; it started the suit in 1900, and had it carried along and prosecuted for almost five years before appearing in person and openly assuming charge.

The Southern Company adroitly bases its argument of good faith upon these bills alone, entirely ignoring the decision of the Circuit Court of Appeals on the former appeal to the effect that *all* the bills were the Southern Company's bills and *all* the proceedings were the Southern Company's proceedings. That was the decree affirmed by this court. Considered as a part of this consistent whole, these Southern Company interventions become but steps in the effort to obtain the Trust Company's collateral without paying the secured debt.

(c) The conduct of the litigation.

Conclusive as this must be, it is by no means all. The conduct of the litigation shows unmistakably the purpose back of its prosecution. Even if we admit that there were a few transactions which might have warranted an investigation, this would not justify what followed. A complete accounting was demanded. Every item was called in question, running back ten to fifteen years. The Trust Company was forced into five years of defensive struggle. The pleadings alone occupy more than 527

pages of the printed record. The report of the master covers more than 313 printed pages, consisting of long statements of the evidence on each point considered and then short statements of his conclusions, of which the following are examples:

> "In the opinion of the master, however, the legal effect of said consolidation *is immaterial* in this cause." (Rec. II, p. 769.)
>
> "For the foregoing reason, it is wholly immaterial whether said stocks came within the lien of the Belt mortgage or not." (P. 770.)
>
> "The claim of the intervener therefor was barred by the statute of limitations of this State." (P. 811.)

These were in addition to the sweeping condemnation of substantially all the charges in the bill under the caption "A Few Controlling Facts." (Rec. II, pp. 647-9.)

During the first four years of the litigation, some 9,000 pages of testimony had been taken. In 1905 and 1906, 27,000 pages of additional testimony was taken. The master stated in his report (Rec. II, p. 580) that for three years prior to the filing of the report, in May, 1910, he had given a large part of his time to the examination and consideration of this lengthy record. Small wonder, when the typewritten volumes, placed one upon another, made two stacks each as high as a man's shoulder.

Five years of pleading and evidence before the master in this accounting suit, and three years of consideration by the master, covering debits and credits during fifteen years—all resulting in the correction of a single error occurring less than two months before the suit was filed, and all requiring an enormous expenditure of time and money in their defense on the part of the Trust Company.

Nor is this all. In the meantime, two injunctions were obtained against the Trust Company, involving exactly the same matter, which had to be taken to the Circuit Court of Appeals before the Trust Company could obtain relief. (146 Fed. 337; 171 Fed. 43.) On the second appeal, in which the court stated that the transcript was voluminous, comprising 742 printed pages (p. 46), after a significant remark that the issuance of an injunction rested not in the "arbitrary whimsical will" of the chancellor but in his "sound judicial discretion" (p. 50), the court dissolved the temporary injunction, and then went further and directed the dismissal of the bill for want of equity (p. 51). Here is almost four years of additional litigation, harassing and futile of results, extending from somewhat prior to the submission to the master to well along to the time of his report.

There is still one further piece of evidence to which we would refer. After ten years of contest over this accounting, the master filed his report finding against the Southern Company on every point involved in that accounting except the one error of July, 1900. He found for that company as to its liability for the Belt debts and as to a part of the Central Company lands. But as to all the accounting, with the single exception, as to all the fraud, as to all the domination and control, as to all the misuse of funds, as to all the breaches of trust, he found for the Trust Company.

The decree of the District Court confirming the report dismissed the Cambria bill outright; dissolved the injunction against the Trust Company as to the sale of collateral; dismissed the bills of the Belt receivers except as to the three small items hereinbefore referred to; found for the Trust Company against the Belt Company in the amount of $639,658.86; sustained the pledge of

securities collateral to the Belt debt; and taxed one-third of the costs against the Belt Company and its receivers.

Yet neither company sees any occasion for an appeal. After ten years of strenuous litigation, involving hundreds of thousands of dollars, if not millions, they both rest content with this decree dismissing their bills for want of equity. They did not appeal. And this, in spite of the opinion now expressed in the last brief of the Southern Company, that the master was clearly wrong as to two of the items, and that an argument against them might forcefully be made even now. One of these items amounted, as stated by counsel, to 25 per cent of the entire claim of the Trust Company, and the other to a greater sum than the entire claim.

Counsel also argue in this last brief that the evidence before the master established the charge of domination. But at the time of the decree, the same counsel, representing the Belt Company and its receivers, as well as the Southern Company, did not see fit to appeal from an adverse decision. No effort was made, apparently, to induce the Cambria Company to appeal, as it had been induced to file the suit. Its counsel, though utterly defeated, was clearly no longer interested.

There can be but one explanation for this failure to act. The Cambria Company was not concerned about any accounting or any pledge of collateral. The Belt Company and its receivers cared nothing for the indebtedness found against it and the costs decreed to be paid by them. Both and all were interested in obtaining for the Southern Company immunity from the Belt debts and title to the pledged assets. When the decree was entered, granting such immunity and a large portion of the Central Company lands to the Southern Company, all the complainants and interveners were satisfied and

had no desire to risk a reversal as to those matters, by an appeal on the issues presented by their pleadings.

Can there be the slightest doubt that the Southern Company itself decided that no appeal should be taken by any of them?

It is an amazing thing that the Trust Company succeeded in carrying the burden of the combined attack of these associates. Ten years of litigation, with a decision in its favor on the original issues, but adverse to it on those issues which were financially most important, faced with a record in the trial court of upwards of 36,000 pages, the cost of printing which alone was practically prohibitive. It did succeed in appealing, however, by standing upon the face of the master's report, without the evidence, and, after vicissitudes partly appearing in this record, obtained a decree affirming the priority of its right to the pledged property, including the Central Company lands, and holding the Southern Company liable to pay the Belt indebtedness. But, even without the printing of the evidence, it was at a cost that virtually robbed it of the benefit of the victory.

And now it is seriously urged that because the Trust Company, after four years and a half of litigation induced under cover by the Southern Company, consented that that company might intervene and fight its own battle in the open, there has been a waiver of all right to complain that the litigation was wanton and vexatious. It is urged that the liability of the Southern Company, not brought into the case by the complainants, nominal or real, but by the Trust Company itself in its answer to the Southern Company's petition, filed, of course, years after the litigation had been begun, was the main issue in the case and prevents the equitable taxation of costs because it was a simple legal issue between two adversaries acting at arm's length.

The liability of the Southern Company was in no sense the main issue in the case. It came in incidentally and assumed importance only because of later developments. It was not by any means the main subject of controversy in the Circuit Court of Appeals on the former appeal. The first decision of that court does not provide for any money decree against the Southern Company, but only for a decree that the Trust Company might enforce its lien on the pledged property, including the Central Company lands, unless the Southern Company paid the secured debt. Not until the second decision did the question of a judgment against the Southern Company become of moment.

The main object of the Cambria bill was the recovery of the pledged property and its proceeds. The debt and the accounting was only incidental thereto. When the ancillary Belt bill was filed, both that company and the Trust Company were in the hands of receivers, those for the Belt Company having been appointed in a creditor's suit on the ground of insolvency and under a petition alleging the insolvency of the Trust Company. The main object of the bill of the Belt receivers was not to obtain judgment against the insolvent Trust Company or to avoid a judgment against the insolvent Belt Company, but to recover the pledged property and its proceeds. The debt and the accounting were incidental.

The main object of the Southern petition was to recover as equitable owner, the collateral held by the Trust Company and the lands of the Central Company, whose stock was likewise held by the Trust Company. It also charged a breach of trust on the part of the Trust Company as trustee under the Union Terminal Company mortgage. The issue of the Southern Company liability could not have come into the case before it became a party

thereto, and its own intervening petition certainly did not present it. That issue did not appear until the Trust Company's answer to the petition raised it.

(d) Conclusion.

It is self-evident from these circumstances, pleadings and procedure, that this was not a suit bona fide instituted for the purpose of determining the issues originally presented. It is impossible "to wink so hard" as not to see that the purpose was to smother the Trust Company with difficulities and expenses until it could no longer sustain the unequal contest. The report of the master found that the Trust Company had expended $11,499.32 in party and party costs (Rec. II, p. 49), and $296,520.37 in solicitor and client costs (Rec. II, p. 59), not including various items not allowed by the master.

It thus appears that more than $300,000.00 was actually paid out by the Trust Company in defense of this litigation, although its original debt, owed by the Belt Company, was approximately only $380,000.00. The final judgment was, of course, much larger; but the major part of the recovery was for interest during the time that collection was wrongfully prevented and while the Southern Company enjoyed the use of the money.

It is true that a considerable amount of attorneys' fees are included in these costs. But as to the larger items, the fees were not paid until after a contest in court and a judgment rendered against the Trust Company on an allowance made and sustained.

It is true, also, that these costs are startlingly large. But it was the purpose of the Southern Company to make them large—so large that the Trust Company could not carry the burden. And it should not now escape the pay-

ment of such costs, made necessary by its own action, on the ground that it made them large. To permit such a thing would leave the Trust Company, in spite of its victory, substantially without the principal of its debt, and with only the interest during the time the funds were withheld by the Southern Company. Its collateral has been, in effect, returned to it reduced in value by the amount of more than $300,000.00.

VIII.

Were fiduciary relationships involved?

In addition to the matters set out herein under Point II. involving the attack made upon the title of the Belt Company to the collateral held by the Trust Company, there are several fiduciary relationships disclosed in the record which justify the taxation of solicitor and client costs. The attempts to avoid the pledge and obtain the pledged property without cost were so varied and from so many angles, that no one relationship can possibly account for them all. There is a trust relation, however, at the bottom of almost every charge.

Take, first, the intervening petition of the Southern Company in its own name. The attack upon the pledge under the after-acquired property clause of the Belt mortgage, as has been pointed out, challenged the title which the pledgee held in trust for the pledgor and made it incumbent upon the Trust Company to defend that issue. This was true directly as to the stocks and bonds pledged, and indirectly as to the lands of the Central Improvement Company claimed by the petition. The lands themselves were not pledged; but the stock of the company, the value of which depended upon the lands, was pledged,

and the Circuit Court of Appeals held on the former appeal that this stock constituted an interest in the lands prior to the claim of the Southern Company. The judgment of that court was that, if the debt to the Trust Company was not paid, these lands should be sold and the proceeds applied thereon. This petition prayed that the pledged property described therein be conveyed and assigned to the Southern Company not the Belt Company or its receivers. (Rec. II, pp. 185-6.)

The amended intervening petition contained the same attack and the same prayer, with one additional charge—paragraph 13 (Rec. II, pp. 288-90). This paragraph charges a direct breach of an express trust. It is alleged that the Trust Company was named as trustee in the mortgage of the Union Terminal Railroad Company securing an issue of bonds; that "it then became the duty of the Trust Company *under the express terms of said mortgage*" to perform certain acts; that "unmindful of its duties as aforesaid" it diverted and misused $1,350,000 of bonds secured thereby; that this was done "wrongfully in breach of its duty as trustee," and "constituted a breach of trust on the part of the Trust Company." The Southern Company made the allegations solely as owner of all the bonds secured by the mortgage. (Rec. II, p. 290.)

If this is not a suit filed by a *cestui que trust* against a trustee for breach of trust, then it is difficult to explain what it is. The petitioner *claims* to be a *cestui*, and sets up the instrument under which the trustee was acting. It alleges a breach of that trust in the plainest possible language. Even in the last brief of the Southern Company it is said that the claim was *"for alleged breach of trust as trustee in the mortgage made by the Union Terminal Railway Company"* (p. 10).

On the succeeding page (11), however, the Southern Company changes this wording, and indicates its attempted evasion of the effects of its litigation. It there states that the issue was: did the Trust Company "assume" a relation of trust with respect to the use of the proceeds of the bonds? The entire argument of the Southern Company is based upon this attempted distinction.

We submit that in this amended petition, there is a direct charge of breach of trust against an express trustee, and that there is no question of assumption about it. We fail to find the word "assume" in paragraph 13, or any words importing the same meaning. What we find is an allegation that "it then became the duty of the Trust Company under the express terms of said mortgage" (Rec. II, p. 289). Other allegations confirm this, and no word detracts from it.

It is true that the Southern Company interpreted the mortgage as imposing duties which the trustee denied and which the court held not to be imposed thereby. But the *cestui* claimed under the mortgage, charged the trustee under the terms of the mortgage, and relied upon the terms of the mortgage which was charged to have been breached. The *cestui* had no rights to set up, except under that mortgage. It is as if a *cestui* should bring suit against his trustee for failure to invest the trust funds as required by the trust instrument; as if the trustee should answer that the trust instrument did not permit investment; and as if the court should sustain the answer of the trustee. Would the *cestui* be heard to say that he was not suing the trustee as such, but was merely trying to charge the trustee with a duty which the trust instrument did not impose upon him and which the trustee had denied?

We contend that this part of the intervening petition is a suit by a *cestui* against his trustee charging a breach of trust, in which the court has found that there was no basis for the suit. We contend that under the authorities heretofore cited (Point V [c]), the trustee is entitled to the expenses of his defense.

Take, next, the various bills of the Belt Company. They are in the main a mass of indiscriminate charges of domination, misuse of funds and fraud. But they contain many allegations amounting in effect if not expressly, to charges by a *cestui* against his trustee for breach of trust. In the original ancillary bill, there are charges that the bonds of the Union Terminal Company were delivered to the Trust Company "for the use and benefit" of the Belt Company, and no accounting made of the proceeds (Rec. II, p. 102); that the Trust Company had likewise disposed of the stock and bonds of the Air Line, belonging to the Belt Company and delivered by it to the Trust Company (Rec. II, pp. 102-3); that there were delivered to the Trust Company secured bonds and stocks amounting to more than $5,000,000.00, which were sold by it and not accounted for to the Belt Company (Rec. II, p. 103); that the stock of certain corporations, organized for the purpose of holding titles to real estate, and issued to the Trust Company "in trust for the use and benefit of the Belt Company," was misused by the Trust Company (Rec. II, p. 105); that certain shares of stock of the Central Improvement Company, "although belonging to said Belt Company, issued to said Trust Company," were disposed of by the Trust Company without accounting therefor. (Rec. II, p. 106.)

The amended ancillary bill, in addition to all the above, charges that the Trust Company undertook the disposition of stocks and bonds and unlawfully took exhorbitant com-

missions therefor (Rec. II, p. 233-7); that it exacted unlawful and exhorbitant trustee's fees (Rec. II, pp. 237-8); that it converted to its own use stocks and bonds delivered to it for disposition (Rec. II, pp. 238-40). The bill prayed, among other things, that an accounting be taken of the transactions and dealings "by the Trust Company for the use and benefit of and as trustee and agent for the Belt Company." (Rec. II, p. 264.) This does not refer to a constructive trusteeship by domination, for that is covered by another prayer.

The second amended and ancillary bill contained similar charges.

Here again is a specific and express attack upon a trustee, as trustee. The *reason* alleged in some instances is the domination of the trustee over the *cestui*. But the *attack* is a direct attack upon the trustee. This is mingled in with charges going to the validity of the pledge by the Belt Company—itself a ground for the allowance of solicitor and client costs—and with other baseless and scandalous charges. These only aggravate the offense, however, in increasing the difficulty and cost of the defense. The *cestui* cannot avoid the reimbursement of his trustee by including equally unfounded charges against the trustee not connected with the trust.

The Cambria bills, taken in themselves and considered as filed bona fide by that company, do not on their face attack any relationship of a fiduciary nature except the pledge. This has been discussed before. But these bills cannot be so taken and considered. The Court of Appeals decided on the former appeal that all this litigation was fathered and prosecuted by the Southern Company itself for its own ends and according to its own preconceived plan. The pleadings should, therefore, all be considered together and taken as one concerted attack by the

Southern Company against the Trust Company to obtain the pledged collateral.

It cannot seriously be denied that breaches of trust in the following express trust relationships, at least, were directly charged against the Trust Company:

(1) The express trust created by the railroad mortgages executed by the Union Terminal Company, the Belt Company, the Consolidated Company, and the Air Line, in all of which the Trust Company was named as trustee;

(2) The express trust created by the delivery to the Trust Company of the stocks and bonds of the Belt and constituent companies, to be marketed by it;

(3) The fiduciary relationship arising from the pledge by the Belt Company to the Trust Company of the various securities deposited to secure the Belt indebtedness.

The Southern Company urges that the questions presented were not whether the Trust Company misconducted itself as trustee under the mortgages, but whether it *assumed* a relation of trust with respect to the proceeds of the bonds. We submit that there is no uncertainty about this matter in the pleadings. They allege that the Trust Company, as trustee under the various mortgages, conducted itself in a manner to breach the express terms of such mortgages. It would be impossible to state a cause of action, even *prima facie*, upon many of the attacked transactions, without alleging an express trust. And an express trust is alleged.

Where one company, the Union Terminal for example, delivers bonds or stocks to another, the Trust Company in this case, to be sold and the proceeds accounted for, there is no *constructive* trust involved. It is an *express* trust, of which the Trust Company is an *express* trustee. If it does not rightly sell and account for the bonds and

stocks and their proceeds, it violates the terms of that *express* trust and not of any "assumed relation with respect to the proceeds." And so it was alleged in the pleadings.

In such cases, the alleged domination and control do not form the basis of the complaint. There is no cause of action stated for such domination and control. They are merely inducement, by reason of which it is alleged the trusts were violated.

We do not think there is any answer to these contentions.

The Southern Company was also an express trustee for the Trust Company.

There is a further fiduciary relationship shown by the record. There was one situation in which the Southern Company was trustee and the Trust Company was *cestui que trust*. That involved the property of the Belt Company purchased by the Southern Company at foreclosure sale under the plan of reorganization. Upon the former appeal in the case, the Court of Appeals held:

> "The property of the Belt Company was a trust fund. The stockholders of that company were trustees charged with the duty to apply that property to the payment of the claims of the Trust Company and of the other creditors of the Belt Company before they took to themselves any share in or benefit therefrom. When the Southern Company took their stock and gave them $4,750,000 par value of its stocks and bonds for their interest in the property of the Belt Company, *it stepped into their shoes and became a trustee for the creditors of the Belt Company* with plenary notice that the interest of those creditors in the property was at least as much as the value of

the stocks and bonds it was giving for the interest of the stockholders, for the rights of the creditors in the Belt property were prior and superior to those of the stockholders."

It appears, therefore, that the Southern Company, holding in its hands the property of the Belt Company in trust to apply its value in part, at least, to the payment of the debt owed to its *cestui que trust*, the Trust Company, brings a suit in equity against its *cestui que trust* to nullify that trust and free the property from any claim on its part. The *cestui*, so attacked, is forced to protect its interest against this baseless and unwarranted suit by its trustee.

Can it be that the trustee, on being defeated in the litigation, can pay to the wronged *cestui* the bare value of its interest and demand the release of the entire trust property without regard to the cost and expense imposed on the *cestui?* Is it conceivable that a court of equity appealed to by such trustee must or should release the trust property to the trustee without requiring him to do equity by restoring the *cestui* to its original position so far as possible?

In Perry on Trusts, Sec. 900, it is said:

> "So if a trustee alleges in his answer that the *cestui que trust* is largely indebted to him, and after a long investigation it turns out that the trustee is greatly in arrears, he will be decreed to pay costs."

How much more should he be so decreed to pay costs if he initiates a baseless suit against his *cestui* in a wrongful endeavor to defeat the trust!

This, too, is an express trust, not a constructive trust. The Southern Company is not a trustee because of any wrongful act on its part. It is trustee because it held the

stock of the Belt Company and was subject to the liabilities imposed upon stockholders in general by reason of their being stockholders. When they become stockholders, they in effect agree that the property of the corporation shall be applied first to its debts before they take any benefit. They become stockholders with that understanding.

When the Southern Company took their stock "it stepped into their shoes," as said by the Court of Appeals on the former appeal, and "became a trustee for the creditors of the Belt Company." Not a constructive trustee, resulting from some inequitable act, but an express trustee, *as the successor of the former Belt stockholders*, who by subscribing to or buying stock assumed a certain trust relationship to creditors.

We have here, then, a normal case of a trustee suing his *cestui* to defeat the trust, under aggravated circumstances. The principles hereinbefore discussed should certainly be applied.

It is urged by the Southern Company that the Trust Company was acting for the protection of its own interests, rather than in a fiduciary capacity, and hence does not come within the rule. This is true in many of the cases conceded by the Southern Company. In creditors' bills, in stockholders' bills, in partition cases and many others, the moving party is acting in his own interest. Every trustee, defending an attack of his beneficiary, is so acting.

In *Walters* v. *Woodbridge*, L. R. 7 Ch. Div. 504 (1878), a contention similar to the one here urged was answered by the court as follows:

> "Lord Romilly says that the trustee here defended himself against a false charge, and was in the same position as any other person who so defended himself; but it was a charge against the trustee in

respect of acts done by him in the due administration of the trusts."

So, if the trustee is seeking to repudiate his trusteeship, and wrongfully denies the *cestui's* rights, the trustee is not entitled to have the *cestui's* attorneys' fees paid out of the fund, even if there be one; and in such a case the trustee will be personally charged with the *cestui's* solicitor and clients costs.

See to this effect the following cases, previously cited:

In re Clark, 174 Ia. 449, 154 N. W. 759 (1915);
Attorney General v. *Old South Society*, 13 Allen 474 (1866);
McGaw v. *Acker, Merrall and Condit Co.*, 111 Md. 153, 73 Atl. 731 (1909);
Woodworth v. *Old Second National Bank*, 154 Mich. 459, 118 N. W. 581 (1908);
Madden v. *Rosseter*, 192 N. Y. S. 113, 117 Misc. Rep. 244 (1921);
American National Bank v. *Warner*, 176 S. W. 863 (Tex. Civ. App.) (1915).

Viewed in this light, there can be no doubt whatever of the right to solicitor and client costs. Even the contention of the Southern Company that the main litigation concerned solely the debt of the Belt Company to the Trust Company and the liability of the Southern Company therefor, becomes an argument in favor of that right.

The Southern Company, as a stockholder of the Belt Company, occupied the position of trustee of the Belt properties for the Trust Company. In repudiation of that trust, it filed a suit, not only vexatiously denying the *cestui's* rights, but baselessly making huge claims against the *cestui*. The latter answered, affirming the

trust and setting up the validity of its rights. It has been put to large expense in sustaining the trust and to enormous expense in establishing its claim. It cannot be that equity will permit the trustee to return to the *cestui* the trust property or its equivalent—not all of it, but only the part to which the *cestui* is entitled—and leave the *cestui* to pay out of its portion the costs and expenses of establishing and enforcing the trust. It cannot be that courts of equity are without power to remedy such a wrong.

IX.

There was a fund in court.

Although no fund in court is essential to the application of the principles above set forth, there was a fund or funds here present over which the court had jurisdiction and which it was in effect administering.

The Circuit Court of Appeals, in its opinion of May 18, 1928, says (Rec., V. 1, p. 748):

> "We have here a case in which the Trust Company, a creditor of the Belt Company, in the course of the litigation uncovered and brought into the constructive possession of the court a fund from which creditors of the Belt Company were entitled to be paid. That fund was represented by the amount which the Southern Company had paid to the stockholders of the Belt Company for their stock pursuant to the reorganization plan."

The position of the Court of Appeals on this point is obviously sound, and this theory alone would be sufficient to justify the allowance of solicitor and client costs to the Trust Company.

The Southern Company, however, attacks this position. (See Sec. V., brief in support of application for certiorari.) It says that no fund was brought into the constructive possession of the court; that the decree of the lower court did not order the distribution of any fund, but merely awarded a personal judgment; and that the Trust Company asserted no claim but its own.

The argument is utterly lacking in substance, because all of the elements insisted upon by the Southern Company are present here. The decree of the lower court did not merely award a money judgment. It reached, and took possession of, and authorized administration upon the fund made available by the Trust Company's litigation. The Circuit Court of Appeals, in its former decision, expressly made the decree a charge upon certain specific described property: the pledged collateral, the Central Improvement Company lands, and the assets of the Belt Company (210 Fed. 723), and ordered that property sold in case of non-payment.

In view of the foregoing, how can the Southern Company contend that no fund was brought into the constructive possession of the court? To be sure, the Southern Company paid the debt, and thereby made it unnecessary for the court to sell the property described; but this cannot alter the fact that the decree authorized a sale of property, at least constructively in its possession.

Furthermore, the stocks and bonds pledged to the Trust Company were certainly in court, by virtue of the injunction against their sale and the appointment of the Belt receivers. The stock of the Central Improvement Company, at least, representing the lands which the Southern Company was endeavoring to secure, had a very substantial value. A part of the costs might properly be chargeable to that fund, now taken over and absorbed

by the Southern Company. But certainly the fund consisting of all the interest of the stockholders in the property of the Belt Company cannot be retained by the Southern Company freed from the burden of these costs.

Nor can that result be accomplished merely by exercising astute action in paying off other creditors, and in thus isolating the Trust Company. As said by the Court of Appeals, "Such action cannot avail to destroy the equitable right of that company to some compensation for its services in this matter." (28 Fed. 2d, 246.)

Central Railroad Co. v. *Pettus*, 113 U. S. 116 (1884), and *Tevander* v. *Ruysdael*, 299 Fed. 746 (C. C. A. 7th Cir.) (1924), are of particular interest upon this point.

The contention of the Southern Company that recovery in this regard must in any event be limited to the amount of the unpaid Belt debts, finds no support that we can find. The following cases would seem to be against the contention:

Tevander v. *Ruysdael*, 299 Fed. 746 (C. C. A. 7th Cir.) (1924);

Planters Rice Mill Co. v. *Merchants National Bank*, 78 Ga. 574, 3 S. E. 327 (1887);

McGaw v. *Acker, Merrall and Condit Co.*, 111 Md. 153, 73 Atl. 731 (1909);

Pickett & Sexton v. *School District of Kansas City*, 193 Mo. App. 519, 186 S. W. 553 (1916);

Madden v. *Rosseter*, 192 N. Y. S. 113, 117 Misc. Rep. 244 (1921);

In re Baldwin's Estate, (1900) 1 Irish L. R. 15.

X.

Counsel fees and costs after June, 1910, are allowable.

The Southern Company contends that under no circumstances is it liable for counsel fees incurred subsequent to the final decree of June, 1910, for the reason that thereafter the only issue in the case concerned the Southern's liability for the Belt debt.

In our opinion the only matter before this court is the power of the District Court to award any counsel fees, and the propriety of the particular items is not in issue. In view, however, of the prominence given the point in the brief of the Southern Company, perhaps a word with respect to it will not be amiss.

There are three answers to this contention, so conclusive that they need only be stated.

1. The decree of the District Court entered in June, 1910, was a single decree, covering the whole case, and must be appealed from *in toto* or not at all. The fees and costs subsequent thereto were incurred in such appeal, and are simply a part of prosecuting and defending the entire litigation.

2. The decree adjudged to the Southern Company the lands of the Central Trust Company, an integral part of the value of the Trust Company's collateral, and that value was not made available to the Trust Company until so ordered by the Circuit Court of Appeals and by this court. The decree of the District Court awarded the Trust Company but a half-loaf.

3. The liability of the Southern Company for the Belt debt was not the only or main issue upon the appeal. The main issue was whether the Southern Company held

the Belt properties in trust and if so what its duties were under the circumstances.

The effort of the Trust Company on the appeal was to have this trust legally determined, and its expenditures were directed to that end. What the Court of Appeals and this court decided was that the trust existed and that the Southern Company must perform in accordance with the terms of that trust. It was not the liability of that company to pay money that was involved, but its obligations as trustee. Not until the decision on appeal were the Trust Company's rights as *cestui* recognized and enforced, and until that time the trustee and the trust property were in court, and the trustee was vigorously contesting the *cestui's* rights.

It is true that very large counsel fees were paid after June, 1910. This goes to the *amount* that should be allowed as costs, rather than to the *power* of the court to allow costs. It may be stated here, however, that these fees were not paid by the Trust Company except upon the final judgments of courts having jurisdiction. The facts in this regard, if they are thought to have any bearing here, can be found in *Mecartney* v. *Guardian Trust Co.*, 274 Mo., 224 (1918), and *Mecartney* v. *Guardian Trust Co.*, 280 Fed. 64 (C. C. A., 8th Cir.) (1922). We refer the court to these cases.

XI.

The situation in England is the same as here.

The Southern Company argues that solicitor and client costs cannot be successfully taxed in this country, for the reason that there is here no fixed standard of fees, as there is in England; that in England attorneys' and solicitors' fees are fixed by law, and are taxed against

the losing party in every case, whether at law or in equity. The fact is that so far as concerns solicitor and client costs in the sense here involved, the situation in England is precisely the same as in this country. Confusion regarding the state of the English law is due to a failure to distinguish between the English terms, solicitor and client costs and solicitor and own client costs.

The English have a system, quite unlike anything in this country, by which the attorney or solicitor in a case may, on motion made in court, compel his client to pay the fees due him for that litigation. This has nothing to do with costs as we understand them. The matter concerns only the solicitor and his client, and not the rights of one party to the litigation against the other. However, these fees which may be thus collected are called solicitor and own client costs, or costs as between solicitor and own client. Any motion or application for such fees is referred by the court to a taxing master, a court official, who fixes the amount to be allowed.

See, as to the foregoing, the Attorneys & Solicitors Act of August 22, 1843, 6 & 7 Vict., Chap. 73; and the Attorneys & Solicitors Act of July 14, 1870, 33 & 34 Vict., Chap. 28.

The Solicitors Remuneration Act of August 22, 1881, L. R. Gen. Pub. St., V. 17, Chap. 44, gives to the Lord Chancellor and others the power to make general orders prescribing and regulating the remuneration of solicitors in connection with non-contentious business. Pursuant to this Act, various remuneration orders have from time to time been issued. The Act concerns only solicitor and own client costs.

It is also true that ordinary court costs in England, taxable as between party and party, include various items of attorneys' fees, more or less nominal in amount. See

Aycкbourn, Practice of the High Court of Chancery, 7th Ed. (1861), p. 396; Daniell, Pleading and Practice of the High Court of Chancery, 4th Am. Ed. (1871), V. 2, p. 1439. These fees are taxable as costs in both legal and equitable actions, and in law actions go as of right to the prevailing party. They correspond to the various small fees, like the $20 docket fee under our Act of 1853, often taxable by virtue of statute or rule of court, as party and party costs in this country.

But the situation with respect to solicitor and client costs in England is identical with the situation here. They are taxed only in Chancery cases, and according to the conscience of the court. There is no fixed or established scale of charges. They are allowed only in the special types of cases herein discussed, principally in connection with litigation between fiduciaries. *Turner* v. *Collins*, L. R. 12 Eq. Cas. 438 (1871); *Mordue* v. *Palmer*, L. R. 6 Ch. A. C. 22 (1870); *Andrews* v. *Barnes*, L. R. 39 Ch. D. 133 (1887); *In re Foster* v. *Great Western Ry. Co.*, L. R. 8 Q. B. D. 515 (1882); Halsbury Laws of England, V. 23, p. 183; V. 26, p. 798.

XII.

Free access to the courts.

The Southern Company fears for the principle of free access to the courts if solicitor and client costs are taxed against it in this proceeding. But its argument proves too much.

This court has frequently sustained the constitutionality of statutes providing for an allowance of attorneys' fees as costs. *Chicago & N. W. R. Co.* v. *Nye-Schneider-Fowler Co.*, 260 U. S. 35, 43 S. Ct. 55 (1922); *Missouri, K. & T. R. Co.* v. *Cade*, 233 U. S. 642, 34 S. Ct. 678

(1914); *Farmers & Merchants Insurance Company* v. *Dobney*, 189 U. S. 301, 23 S. Ct. 565 (1902); *Home Life Insurance Co.* v. *Fisher*, 188 U. S. 726, 23 S. Ct. 380 (1902).

Congress evidently has not been much swayed by such an argument, for it has enacted several statutes allowing fees in particular types of cases. United States Code Annotated, Title 17, Section 40; Title 28, Sections 819, 824, 825, 829; Title 49, Sections 8, 16 (2) (sustained in *Meeker* v. *Lehigh Valley R. Co.*, 236 U. S. 412, 35 S. Ct. 328 [1914]).

We see no reason for contending that a taxation of solicitor and client costs works a denial of free access to the courts, more than does a taxation of party and party costs. The character of litigation in which solicitor and client costs are properly taxable must be borne in mind. If they are awarded under circumstances where the litigation is so unwarranted as to justify an implication of bad faith, certainly there is no substance to the argument that free access to the courts is unlawfully denied. No honest litigant is penalized.

Louisville & N. R. Co. v. *Stewart*, 241 U. S. 261, 36 S. Ct. 586 (1915), sustains a state statute which adds 10 per cent to the amount of a judgment appealed from, if affirmed on appeal.

Rule 23 of this court provides that in all cases where a writ of error shall appear to have been sued out merely for delay, damages at a rate not exceeding ten per cent, in addition to interest, shall be awarded upon the amount of the judgment; and that the same rule shall be applied to decrees for the payment of money in equity cases. The rule has often been enforced. See *Southern Ry. Co.* v. *Gadd*, 233 U. S. 572, 34 S. Ct. 696 (1913); *Texas &*

Pacific Ry. Co. v. *Prater,* 229 U. S. 177, 33 S. Ct. 637 (1913); *Hennessy* v. *Sheldon,* 12 Wall. 440 (1870).

Moreover, the right of free access to the courts has an equally vital correlative—the right of freedom from court interference when nothing has been done to warrant being forced into court. The imposition of costs upon equitable principles is an instrument in the hands of the court for effecting justice between the parties. They may be imposed upon a defendant for an unconscionable defense, and on a plaintiff for a vexatious action. It is a shield to both parties against inequitable attacks.

If this court should hold that the District Court had no power to award attorney's fees to the Trust Company, and this court no power to authorize such an award, it would deliberately be putting out of its hands and placing beyond its reach, an effective weapon for the betterment of judicial administration. We cannot believe that the court will so deprive itself of power. It is a matter of concern not only to our client, but to all those litigants who may, in time to come, be in the same situation.

The "judicial power of the United States" is by the Constitution vested in this court and the lower Federal Courts. That is to say, *all* the judicial power of the United States. Is is possible that these courts are so devoid of power that they cannot regulate costs in proceedings before them? And, too, regulate costs as they have been regulated for centuries in the country from which our legal institutions were derived? Why should not the same policy which warrants this court in assessing penalties for frivolous appeals be available to District Courts to penalize the filing of frivolous or vexatious suits before them? Is not this power necessary to the

protection of those courts themselves from being used as instruments of oppression?

Justice and fairness under the circumstances demand that the Southern Company reimburse the Trust Company for the expenses of this litigation. It is urged that the amount of those expenses is very large. So it is. But still not so large as the damage to the Trust Company. The expense has been incurred and paid. Who should settle the bill? The Trust Company, which has been innocently dragged through the courts? Or the Southern Company, which instigated ten years of litigation to find one small error and brought about more than any other factor the financial ruin of the Trust Company?

The decision of the Circuit Court of Appeals, rendered after a most exhaustive examination of the facts and authorities, fully upholds the Trust Company's claim, and should be affirmed.

We are not confronted with any difficulties, suggested by counsel for the Southern Company, in arriving at the amount of solicitor and client costs which should be taxed. A master has heard evidence thereon and filed his report. The District Court should be directed to pass upon the exceptions thereto.

Respectfully submitted,

JUSTIN D. BOWERSOCK,
ROBERT B. FIZZELL,
JOHN F. RHODES,
Attorneys for Respondent.